(15,928.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 639.

JOSEPHINE W. WUPPERMANN, APPELLANT,

vs.

THE STEAMSHIP "CARIB PRINCE," HER ENGINES, &c., ERNEST LEGGE, CLAIMANT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	*a*
Transcript in case of Wupperman *vs.* "Carib Prince"	1	1
Statement	1	1
Libel	2	2
Answer	3	3
Evidence for libellant	7	7
Testimony of Ernest C. Legge	7	7
Edward Keeys	35	35
Evidence for claimants	50	50
Testimony of Thomas Congdon	50	50
Joseph Short	57	57
Henry Woolard	62	62
Andrew Trotter Lynn	68	68
William Lloyd Sharpe	73	73
Matthew Coulson James	79	79
Herbert Vernon Saunders	84	84
Frank S. Martin	90	90

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 10, 1896.

	Original.	Print.
Testimony of James McPherson Scott	94	94
Richard Hopkins	107	107
Evidence for libellant	113	113
Testimony of Daniel Quinn	113	113
Benjamin J. Clark	116	116
Daniel Quinn (resumed)	121	121
Evidence for claimants	127	127
Testimony of Owen McGowan	127	127
Thomas Congdon (recalled)	132	132
Frank S. Martin (recalled)	137	137
Herbert Vernon Saunders (recalled)	138	138
Libellant's Exhibit No. 1—Blue-print diagram	143	143
Blue-print diagram	144	144
Claimants' Exhibit No. 3—Bill of lading	145	145
A—Time charter	148	148
Exhibit A—Extracts from specification of S. S. "Carib Prince," produced by witness M. C. James	157	157
Three pages of chief officer's log	159	159
Three pages of chief engineer's log	162	162
Stipulation as to use of logs in evidence	165	165
Opinion	166	166
Final decree	169	169
Notice of appeal	170	170
Assignment of errors	171	171
Clerk's certificate	172	172
Transcript in case of Cadenas & Coe *vs.* "Carib Prince"	173	173
Statement	173	173
Libel	174	174
Answer	176	176
Order on exceptions to answer	181	181
Amended answer	183	183
Stipulation as to omission of testimony, &c.	184	184
Final decree	185	185
Notice of appeal	186	186
Assignment of errors	187	187
Clerk's certificate	188	188
Transcript in case of Middleton & Lee *vs.* "Carib Prince"	189	189
Statement	189	189
Libel	190	190
Answer	191	191
Stipulation as to omission of testimony, &c.	194	194
Final decree	195	195
Notice of appeal	196	196
Assignment of errors	197	197
Clerk's certificate	198	198
Transcript in case of Gillespie *et al. vs.* "Carib Prince"	199	199
Statement	199	199
Libel	200	200
Answer	202	202
Stipulation as to omission of testimony, &c.	205	205
Final decree	206	206
Order of substitution of proctors	207	207

	Original.	Print.
Notice of appeal	208	208
Assignment of errors	209	209
Clerk's certificate	210	210
Opinion	211	211
Clerk's certificate	217	215
Writ of certiorari	218	215
Stipulation as to return to writ of certiorari	219	215
Decree	221	216
Clerk's certificate	224	217

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

JOSEPHINE W. WUPPERMANN,
Libellant and Appellant,

vs.

THE STEAMSHIP "CARIB PRINCE," HER ENGINES, &c., ERNEST C. LEGGE,
Claimant and Appellee.

MANUEL CADENAS ET AL.,
Libellant and Appellant,

vs.

THE SAME,
JAMES KNOTT,
Claimant and Appellee.

CLIFFORD L. MIDDLETON ET AL.,
Libellants and Appellants,

vs.

THE SAME.

WILLIAM GILLESPIE ET AL.,
Libellant- and Appellant-,

vs.

THE SAME.

APOSTLES.

Appeals from the District Court of the United States for the Eastern District of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Apr. 5, 1895. James C. Reed, clerk.

United States District Court, 1

EASTERN DISTRICT OF NEW YORK.

JOSEPHINE W. WUPPERMANN

vs.

The Steamship "CARIB PRINCE," her engines, &c., ERNEST C. LEGGE,

Claimant. 2

STATEMENT.

1893.	Sept.	19.	Libel filed. No process issued.
	"	"	Claim filed by Ernest C. Legge, master, agent for James Knott, owner.
	"	"	Stipulation for value filed.
1894.	March	13.	Answer filed.
	June and	14 to 18.	Cause tried before Honorable Charles L. Benedict, *Judge*.
	Oct.	4.	Decision rendered.
	"	11.	Final decree entered. 3
	"	20.	Notice of appeal and assignment of errors filed.

4 To the Honorable CHARLES L. BENEDICT, Judge of the District Court for the United States for the Eastern District of New York:

The libel and complaint of Josephine W. Wuppermann against the steamship *Carib Prince* in a cause of contract, civil and maritime, alleges and articulately propounds as follows:

FIRST.—That your libellant resides in the City of New York, and is engaged in business therein.

SECOND.—That on or about the 31st of August, 1893, there was shipped upon the steamship *Carib Prince*, then lying in the Gulf of Paria, and bound
5 for the port of New York and engaged in business as a common carrier by Doctor T. G. B. Siegert & Sons, five hundred cases Angostura bitters, the property of your libellant, to be carried to the port of New York, and there delivered unto your libellant in the like good order as received, for a freight agreed to be paid therefor, and the agents of said steamship signed bills of lading therefor, dated the 31st of August, 1893, whereby they acknowledged the receipt of said 500 cases in good order and well conditioned, and undertook to deliver the same at the port of New York in like good order.

6 THIRD.—That thereafter, and on or about the day of September, 1893, the said steamship *Carib Prince* arrived at the port of New York and there delivered to libellant the said five hundred cases, but not in like good order as received, and that your libellant has suffered damages thereby in the estimated amount of fifteen hundred dollars, payment of which has been demanded of said agents of said steamship and refused.

FOURTH.—That the said steamship *Carib Prince* is now in the port of New York and within the jurisdiction of this Honorable Court.

FIFTH.—That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court. 7

Wherefore, libellant prays that process in due form of law issue against said steamship, her tackle, &c., and that all persons interested therein may be cited to appear and answer all and singular the matters aforesaid, and that the said steamship may be condemned and sold to pay the same to your libellant, with interest and costs, and that otherwise right and justice may be done.

JOSEPHINE W. WUPPERMANN.

Sworn to before me this 18th day of September, 1893.

AVERY F. CUSHMAN,
[L. S.] Notary Public,
Kings County.
Certificate filed in New York County. 8

GEORGE A. BLACK,
Proctor for Libellant,
44 Pine Street,
New York City.

(Endorsed)—Libel filed September 19, 1893.

To the Honorable CHARLES L. BENEDICT, United States District Judge for the Eastern District of New York: 9

The answer of James Knott, owner and claimant of the steamship *Carib Prince*, to the libel and complaint of Josephine W. Wuppermann against the steamship *Carib Prince* in a cause of contract, civil and maritime, alleges as follows:

FIRST.—He has no knowledge of the matters alleged in the first article of the libel and requires proof thereof if material.

10 SECOND.—He has no knowledge of the matters alleged in the second article of the libel and requires proof thereof if and in so far as they are material.

THIRD.—He has no knowledge of the matters alleged in the third article of the libel and requires proof thereof if and in so far as they are material.

FOURTH.—He admits the matters contained in the fourth article of the libel.

FIFTH.—He denies that all and singular the premises are true, but admits the jurisdiction.

SIXTH.—For a further defense, the claimant avers
11 that the bills of lading under which the merchandise in question is alleged to have been carried provided that the merchandise in question was "to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good manner and well conditioned, at the aforesaid port of New York; the act of God * * * loss or damage from heat or fire on board, in hulk or craft or on shore, explosion, steam, accidents to or latent defects in hull, tackle, boilers and machinery, or their appurtenances, jettison, barratry, any act, neglect or default whatsoever of pilots, masters or crew in the management or navigation of the ship * * * and all and every other dangers and accidents of
12 the seas, rivers or steam navigation, of whatever nature or kind always excepted. * * * Weight, measure, quality, contents and value unknown, and not accountable for inaccurate description of goods shipped, for leakage, breakage or insufficiency in packing, or in strength of package, obliteration of or inaccuracies of marks, numbers, designation or address on the packages, nor for damage or loss from vermin, sweating, decay, heat of holds, contact with, or smell or evaporation from other goods; nor for any consequences arising from any of the foregoing exceptions."

That the owner and charterer of said vessel used

all due diligence to have her properly equipped, 13
manned, provisioned and outfitted, and in every way seaworthy and capable of performing her intended voyage, and used all due diligence in and about the transportation of the merchandise in question, and allege that if the cargo mentioned in the libel was damaged as alleged, the damage was due to latent defects in certain rivets, angle irons, braces and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage, as will more fully appear on the trial of this cause.

The claimant further alleges that each and all of 14
the above mentioned exemptions in the bill of lading are valid by the law of England, which prevails at the port where said merchandise is claimed to have been shipped, and where the said bills of lading are alleged to have been issued.

Wherefore, claimant prays that the libel may be dismissed, with costs, or that the claimant have such other relief as he may be entitled to receive.

CONVERS & KIRLIN,
Proctors for Claimant.

Southern District of New York, ss.:

E. B. CONVERS, being duly sworn, says: That he
is one of the proctors for the claimants herein, and 15
that the foregoing answer is true, according to his information and belief, derived from statements made by the officers of said steamship. He further says that the claimant is absent from the United states.

E. B. CONVERS.

Sworn to before me this 13th day of March, 1894.

CHARLES A. BRODEK,
[L. S.] Notary Public,
N. Y, Co.

(Endorsed—Answer filed March 13, 1894.)

16 UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

JOSEPHINE W. WUPPERMANN

vs.

The Steamship "CARIB PRINCE."

Before Hon. CHARLES L. BENEDICT, Judge.

CLIFFORD L. MIDDLETON *et al.*

17 vs.

THE SAME.

MANUEL CADENAS *et al.*

vs.

THE SAME.

18 WILLIAM GILLESPIE *et al.*

vs.

THE SAME.

BROOKLYN, N. Y., June 14, 1894.

APPEARANCES:

GEORGE A. BLACK, Esq., for the Libellants.

CONVERS & KIRLIN, Esqs. (Mr. Kirlin), for the Claimants.

The pleadings in the respective cases are read. 19

The exceptions filed by the libellant Josephine Wuppermann are withdrawn.

In all the cases the partnership of the libellants and the ownership of the property by the libellants are admitted.

It is considered that the manifest is in evidence, and it is admitted that the cargo was on board and bills of lading were given.

It is admitted that under the English law the language of the bill of lading made a valid contract.

Mr. Black reads deposition of ERNEST C. LEGGE, taken on behalf of the libellant, as follows:

20

Q. What position do you occupy on the steamship *Carib Prince?* A. Master.

Q. How long have you been her master? A. Three months; since she has been out.

Q. You mean by her being "out" that she is a new vessel, just finished, and that you took command of her when she was first put in commission? A. Yes, sir.

Q. And the month you took command of her was what? A. Last June.

Q. Is she an iron vessel? A. Iron and steel, composite.

Q. Has she between-decks? A. Yes, sir.

Q. With water tight compartments? A. Yes, sir. 21

Q. Has she a collision bulkhead? A. Yes, sir.

Q. Has she water ballast tanks? A. Yes, sir.

Q. Has she any other tanks besides the water ballast tanks? A. Only fresh water tanks.

Q. Is there a tank forward of the collision bulkhead? A. Yes, sir.

Q. Is that a fresh water tank? A. No, sir; salt water.

Q. How is that filled? A. Filled from the deck by a hose from the steam service pipe.

Q. Do you mean a hose led down into it, or by a

22 pipe leading down into it, by which a hose is attached? A. By which a hose is attached.

Q. How is it emptied? A. Emptied by connections from the engines.

Q. And it is pumped out and discharged through the scuppers on deck? A. Through the engine valves, through the engine-room.

Q. That is, by opening some valve they can let it run into the engine-room, and it is from there pumped out? A. Yes, sir; it is by direct connection with the ballast pump.

Q. What is the capacity of that tank in foward of that collision bulkhead? A. To the best of my knowledge, I think it is eighty-three tons.

23 Q. Do you know what that represents in gallons, about? A. I haven't figured it out; some thousands.

Q. The *Carib Prince* is a freight steamer entirely, is she not? A. Freight and passenger.

Q. What are the ways in which her holds are designated, by numbers or by names? A. By numbers.

Q. The one next to the collision bulkhead is number what? A. No. 1.

Q. And running aft the successive ones are what? A. 2, 3 and 4.

Q. How many has she altogether? A. Four.

Q. Does the ballast tank, which is aft of the collision bulkhead, extend the entire length of the

24 vessel? A. Yes, but it is divided by the bulkhead.

Q. It is a tank which, if not divided, would extend the entire length of the vessel? A. Yes, sir.

Q. Do each of those tanks extend the entire width of the vessel? A. No.

Q. How much short of the width of the floor do they extend? A. The bilges on each side.

Q. The bilges are the triangular spaces formed by the sides of the vessel and the upright sides of the tank? A. Yes, sir.

Q. About how wide are those bilges? A. They vary in size according to the shape of the ship.

Q. In the No. 1 lower hold about what would be

the width of the bilges? A. About eighteen inches 25
at the widest; right forward there is no room to admit of bilges, just a space.

Q. How deep is the tank forward of the collision bulkhead; does it run from the main deck down, or is it a deck below the main deck? A. From the between-decks to the bottom of the ship.

Q. And does the collision bulkhead form one of the sides or faces of the tank? A. Yes, sir; one side.

Q. What is that collision bulkhead made of? A. Steel plate.

Q. In one or more than one piece? A. A number of pieces.

Q. And those pieces are jointed together by lapped 26
joints, are they not? A. They are lap-jointed.

Q. Isn't it also reinforced by angle iron or some form of iron which gives it something to stiffen it? A Yes, sir.

Q. On which side does this stiffening or additional iron come? A. On the inside.

Q. That is in the No. 1 hold? A. In the inside of the tank, the fore part of the collision bulkhead.

Q. Is there nothing on the other side of it. A. No, sir.

Q. So that it is perfectly smooth? A. There is nothing but between-deck ties; that is on the top.

Q. What is the tonnage of this vessel? A. 1,304 net tonnage.

27

Q. How long is she? A. Three hundred feet.

Q. What is the draft of water to her, Plimsoll? A. I don't remember.

Q. Look at your log, if it will give it? A. I haven't it in the log. It is noted in the official log, but I haven't the official log here.

Q. Don't you know? A. I don't remember.

Q. What is the extreme draft you have ever loaded her to aft and forward? A. Her extreme draft, as near as I can say, is about 18 feet 3 aft, and 17 feet 9 forward; her proper loading draft

28 that she could load to is about 20 feet; but she has never been down to that.

Q. Do you remember what day it was that you sailed from Trinidad in the month of September of this year? A. We left Trinidad on the 31st of August.

Q. Did you stop at any port or come direct? A. Stopped at Grenada.

Q. What day did you leave Grenada? A. The next day.

Q. Where is Grenada? A. Grenada is just north of the island of Trinidad.

Q. Did you take in any cargo at Grenada? A. No, sir.

29 Q. And from there you came direct to New York? A. Direct to New York.

Q. What kind of cargo had you on board when you left Trinidad? A. We had asphalt, cocoa, cocoanuts, a very little sugar, hides and bitters.

Q. In which compartment were the bitters stowed? A. In No. 1 compartment.

Q. In which compartment was the cocoa stowed? A. No. 1 also.

Q. What part of No. 1 were these things that I have mentioned stowed? A. On the floor right across the hold.

Q. I think I did not ask you whether or not there was a floor laid in No. 1 hold on top of the ballast
30 tank? A. Oh, yes.

Q. What kind of a floor is that? A. A wooden floor.

Q. Not a caulked floor; open, isn't it? A. It is caulked across, but not tight in the bilges.

Q. You mean that at the bilges it is open entirely? A. The limber boards are laid there, but not tight.

Q. These bitters and this cocoa, I understand you, were stowed upon the floor? A. Yes, sir.

Q. On your arrival at New York did you find any damage to the cargo which had been stowed in No. 1? A. Yes, sir.

Q. It was wet with water, wasn't it? A. Yes, 31
sir.

Q. Did you at any time on that voyage fill the ballast tank forward of the collision bulkhead? A. Yes, sir.

Q. On what day was that filled? A. On the Sunday night, the 3d of September.

Q. When you left Grenada it had not yet been filled? A. No.

Q. How was it filled; by pumping the water in it with the pumps in the engine-room? A. Yes, sir.

Q. Who attended to that business of filling it? A. The chief officer.

Q. Who gave the orders to have it filled? A. I did.

32

Q. At that time did you, or not, know that the ballast tank was defective? A. I did not know it.

Q. When did you first find out that it was defective? A. By sounding the tank the next morning.

Q. What did you discover by sounding it? A. Discovered that the tank wasn't full when it had been full the previous night after filling it.

Q. How much of it did you find had got out? A. Over four feet of water.

Q. You didn't tell me how deep that tank was from the under side of the between-decks which forms the top of it to the bottom, which I believe you said was the floor of the ship? A. About 33
twenty-four feet.

Q. And do the sides of the ship form the sides of the tank? A. Yes, sir.

Q. Did you investigate to see what had become of this water which had got out of this tank when you discovered that there was a leak? A. Yes, sir.

Q. Where had it gone to? A. In the fore hold, No. 1 compartment.

Q. Did you open the fore hold and go down into it? A. Yes, sir.

Q. Did you see the condition of things when you went into it? A. Yes, sir.

Q. What did you discover? A. Discovered there was water in the hold.

Q. Water slopping around in there? A. Yes, sir; by the movement of the vessel.

Q. On top of the cargo or not up to the top? A. Not up to the top.

Q. How high did it come up on the cargo? A. Abour two tiers up; a little over two tiers.

Q. That means how many feet above the floor? A. About three feet.

Q. What steps did you take to get that water out of the No. 1 hold? A. Moved the bags and the cases that were in the sides of the ship so as to clear the limber boards so as to allow the water to get into the bilges and be pumped out through the engines.

Q. In order to reach the engine there had to be some valve opened? A. No, sir.

Q. How is the bilge connected with the engine-room? Isn't it through a valve of some kind, or a cock, or some method of opening and shutting? A. It goes right through to the second collision bulkhead.

Q. Where is the second collision bulkhead? A. The after part of No. 2 hold and the fore part of No. 3 hold, the engine and boiler-room division.

Q. Is that bilge connection always open so that if any water reaches the bilges it will be sure to reach the engine room eventually? A. Yes, sir.

Q. It must do that? A. Yes.

Q. There is no stoppage for it? A. There is a sluice on the second collision bulkhead.

Q. Which is the division between No. 2 and the engine-room? A. Yes, sir.

Q. Is that sluice always kept open to the engine-room, so that if water accumulates in the bilges it will run off? A. Always open.

Q. The only reason why this water did not run off from No. 1 was the fact that the cargo lying on the limbers had stopped the access of the water to the bilges? A. Yes, sir; after we moved this cargo

to get the water away we bored holes to let the water go through. 37

Q. And until you bored those holes the water staid there? A. Yes, sir.

Q. Did you investigate the condition of that bulkhead to find out how it was that the water had escaped from the tank through the collision bulkhead? A. Yes, sir; we made a survey.

Q. What did you find to be the fact as to that? A. We found water leaking through a rivet hole.

Q. In which there were no rivets? A. Part of the rivet was in it; the head was off of it.

Q. Did you find any spaces where there were no rivets at all? A. No.

Q. None? A. No. 38

Q. Were you present at a survey held in New York on that bulkhead? A. No.

Q. Did you go down into this tank yourself? A. No.

Q. Only into the No. 1? A. Yes, sir.

Q. How many rivets did you find in the condition you have mentioned, without heads? A. One.

Q. What did you do with respect to that one? A. Ordered the carpenter to punch it out and put a plug in to stop the leak.

Q. Did that stop it? A. Yes, sir; and at the same time I ordered the tank to be pumped out as well.

Q. And was that done? A. Yes, sir.

Q. As I understand, none other of your cargo was damaged except that in No. 1? A. Nothing else. 39

Mr. Kirlin reads CROSS-EXAMINATION:

Q. Who were the builders of this steamer? A. Joseph Short & Co.

Q. Are they builders of good standing?

Objected to as immaterial.

A. They are supposed to be.

Q. What did you mean by saying that part of the vessel was of iron and part steel? A. The hull of the

40 vessel is steel, but the between-decks are iron, I believe.

Q. What are the bulkheads? A. The bulkheads are of iron.

Q. Do you know about that positively? A. That is to the best of my knowledge.

Q. How did you come to fill up this tank on the 3d of September? A. On leaving Grenada, the vessel was three feet by the stern, and proceeding to New York every day using coal, burning coal, puts her more by the stern.

Q. It lightens her up forward? A. I considered it absolutely necessary to fill this ballast tank to keep the vessel in trim.

41 Q. Had you a cargo on board? A. Yes, sir.

Q. What was the draft when you left Grenada? A. 14 feet 10 forward, and 16 feet 10 aft.

Q. Had you had a cargo on the voyage from New York to Trinidad also? A. Yes, sir.

Q. How high is the ballast tank in the No. 1 hold; how high does it extend up from the skin of the ship? A. 3 feet 8.

Q. Amidships or the forward end? A. That is a level tank; it only alters in the curve of the ship.

Q. Allowing for the curve of the ship up to the edge of the bulkhead, what would be the depth of the bilge at the after end of No. 1? A. 2 feet.

Q. What would it be at the forward part of No.
42 1? A. 15 to 18 inches.

Q. What is the size of the hole to the bulkhead between No. 1 and No. 2 that carries the water off? A. About 2½ to 3 inch limber holes.

Q Then it goes back to the bilge of No. 2 hold and stops at the engine-room bulkhead? A. Yes, sir.

Q. What is the size of the sluice into the engine-room? A. Three inches square, with a gate.

Q. Where is that gate managed from? A. From the deck.

Q. As a matter of fact, the opening or closing of that sluiceway is left to the discretion of the

engineer, is it not? A. Not always; in case of anything serious—— 43

Q. Ordinarily it is closed, isn't it? A. In the ordinary run of the ship it is always kept open; it is there to close in case of accident.

Q. Are you sure the floor of the hold is caulked? A. Yes, sir.

Q. Well, the limber boards you said were not caulked, but when you went to get them up, you found them soaked tight, so that no water went through them?

Mr. Black: I object to that question "soaked tight" as not testified to by the witness, and as leading.

44

A. Of course, when there is a lot of cargo right across the ship and there is water on the top it is difficult to find the exact position of the handles to lift the boards: you might have to lift a lot of cargo before you found the handles, and I moved some away and bored the holes in place of finding the handles.

Q. It was intended originally, I suppose, to have the boards loose enough so that the water in the hold will go through them to the bilge?

Objected to.

A. No; they are not so intended. They are intended to be lifted so as to clean the bilge. 45

Q. Otherwise you say they are intended to be tight? A. I don't know that there is any law that they should be tight; they are ordinary planks, and made to fit in; they are not made water tight; water might get in, and water might not.

Q. I suppose you don't know whether some of the water went in or not, do you? A. No; I don't know.

Q. When you finally got to them and got them raised up, did you find them soaked tight? A. We didn't raise them at all.

46 Q. Did you raise them in New York? A. We raised them in New York.

Q. How did they raise then; easily, or how? A. Hard; had to ply them open with a bar.

Q. Do you know the depth of the ship from the top deck to the keel? A. 26 feet loaded depth amidships.

Q. Would she be that deep in the fore peak? A. No, less nine feet, I think.

Q. How deep would it be there? A. 20 to 21 feet.

Q. From the top of the tank to the bottom of the tank, what is your best judgment as to the depth? A. 20 or 21 feet; I should say about that; I have not been in the tank.

47 Q. When you went down into the No. 1 hold, what time of day was it? A. The first thing in the morning.

Q. Of the 4th of September? A. Yes, sir.

Q. Whom did you find there when you got there? A. The chief engineer had gone down there before me, and the chief officer.

Q. Did you ascertain what the cause of the damage was; did you see it right away? A. No; I didn't see it right away; the mate notified me at once that it was the fore tank that had been leaking, upon the carpenter's reporting to him directly he had sounded it.

Q. What did you find when you had examined
48 the bulkhead? A. Found a rivet head was broken in No. 1, on the cargo side.

Q. On the port or starboard side? A. On the port side.

Q. How near the side of the ship? A. Well, it was about eighteen inches from the side; two feet or 18 inches.

Q. A rivet head on the hold side of the bulkhead was gone? A. Yes, sir.

Q. Did you find that? A. Yes, sir; lying on the bags of cocoa.

Q. Who picked it up? A. The carpenter, and passed it to the chief officer.

Q. Was it lying right underneath the place where 49
it had dropped off the boat? A. Yes, sir.

Q. And you saw it picked up, did you? A. No, sir. I didn't see it picked up; I was just coming down the hold.

Q. How many tiers of cargo were right where the rivet head was picked up? A. About four tiers.

Q. How far above the top of the cargo was the broken rivet? A. It was on the second tier down below the top of the cargo.

Q. Then the rivet would be about three feet above the floor in the No. 1 hold, the broken rivet? A. About that; yes.

Q. How much water was there in the hold? A. I couldn't say exactly, you know, because the cargo 50
being there of course the water would wash around the space around the bags.

Q. You said it washed up and damaged two tiers? A. Yes, sir.

Q. Do you mean to say that the hold was full of water to the depth of two tiers? A. Of course the motion of the vessel would swash the water about.

Q. Do you know how deep the water was on the floor? A. I should say about 18 inches.

Q. The entire length of the hold? A. No, in the after end; of course the sheer of the ship would allow the water to go off against the next bulkhead.

Q. Was there any water on the floor at the for- 51
ward end of the hold? A. Nothing permanent there; just what swashed about.

Q. How long is the space in the fore-peak from the collision bulkhead to the forward part of the tank? A. Fifteen feet, as near as I can think now.

Q. When you discovered this broken rivet was water coming through the rivet hole? A, Yes, sir.

Q. Squirting out? A. Yes, sir.

Q. What is the diameter of the rivet hole? A. Three-quarters of an inch.

Q. Was this cargo transported under bills of lading? A. Yes, sir.

52 Q. The cocoa and the bitters? A. Yes, sir.

Q. Have you copies of the bills of lading with you? A. I have.

Q. Will you please produce bills of lading covering the cocoa marked A G & C, *Loisa* and *Magdalena?* C C

The witness produces the bills of lading called for.

Q. What signatures do they bear? A. The signature of our agents in Trinidad.

Q. Who are they? A. Turnbull, Stewart & Co.

Q. That is, the agents of the Trinidad Line? A. Yes, sir.

53 Q. Did you sign any bills of lading at all? A. Not myself.

Mr. Kirlin: I offer these bills of lading in evidence, subject to the right of the libellants to substitute the originals from the Custom House, if desired.

The bills of lading are marked Claimants' Exhibits 1 and 2, respectively.

Q. Will you please produce the bill of lading for the Angostura bitters? A. This is it, sir; the original was signed in the same way.

Bill of lading offered in evidence.

54 Taken under the same stipulation and marked Claimants' Exhibit 3.

Q. What time did you leave New York on the voyage from here down to Trinidad? A. Fifteenth of August.

Q. What kind of a voyage did you have down?

Objected to as immaterial.

A. Very rough one—rough weather going down.

Q. Were you in the hurricane of the 20th of August?

Objected to as immaterial.

A. Yes, sir. 55

Q. How long did that last; how long were you in it?

Objected to as immaterial, and it is stipulated that this objection shall apply to all the inquiries as to the previous voyage without being noted each time.

Q. When did you get into the hurricane first? A. Sunday, the 20th.

Q. Have you the mate's log with you? A. Yes, sir.

Q. Do the occurrences during the hurricane appear in the log? A. Yes, sir.

Mr. Kirlin: I call upon proctor for libellants to 56
produce the log so that I may offer it in evidence.

Mr. Black: Well, that's cheeky.

The log is produced by the witness.

Q. Were you subpœnaed to produce the log? A. I was.

Q. Will you please produce your subpœna?

The witness produces the subpœna.

The subpœna is offered in evidence and marked Claimants' Exhibit 4.

Q. When did the gale begin on the 20th of August; what time of day? A. Sunday evening, about eight o'clock. 57

Q. What is the first entry in the log in relation to the gale?

Same objection as before, and same stipulation to apply.

A. (Reading.) "Sunday, Aug. 20, 8.30. Gale "increasing with heavy squalls, sea rising and "barometer falling rapidly. Vessel shipping very "heavy water fore and aft."

Q. What was your course at that time? A. S. by E. half E.

58 Q. Which way did the storm come from? A. E. S. E.

Q. Did you make any change in the speed in consequence of that storm? A. Yes, sir; eased her down.

Q. Did you make any change of course on account of it? A. No; I found she laid very well to the wind in the position she was.

Q. Did you heave-to in consequence of the storm? A. Yes, sir.

Q. When? A. At midnight on Sunday night.

Q. What is the entry in the log on the 21st of August?

59 Objected to on the ground that the log speaks for itself; also as immaterial and incompetent.

The page of the log under date of August 21st is offered in evidence and is marked Claimants' Exhibit 5.

It is as follows:

"A. M. Gale increased to a hurricane with ter-
"rific squalls, causing a tremendous sea. Atmos-
"phere thick with driving rain and spray. Ship
"laboring and straining exceedingly, shipping huge
"quantities of water fore and aft.

"1 A.M. All hands were called, and oil was used
"from the midships water-closet, and four oil bags
"along the weather side. Hands securing large spar
60 "on starboard side aft which had worked adrift in
"its lashings, also trying to protect the sheep which
"were carried on the after deck.

"3 A.M. Wind veered to North, causing terrific
"cross sea Barometer 28.67.

"5 A.M. Wind veered to N. W., still blowing a
"hurricane. Barometer 28.60 (lowest reading).

8 A.M. Wind had veered to West, a terrific sea.
"Barometer rising rapidly, hurricane moderating
"somewhat.

"Noon. Wind abating somewhat, having veered
"to South. Barometer 29.64, but tremendous cross

"sea running, ship rolling and straining very 61
"heavily.

"No observations possible this day.

"4 P.M. Wind had veered to S. S. E., blowing a "heavy gale, sky clearing somewhat. Barometer "29.80. During the afternoon one of the sheep "pens was smashed by a heavy sea and eight sheep "were either killed or drowned. Oil still being "used on the sea and engines worked just sufficient "to keep her to the sea. During the night shipped "a heavy sea and smashed the fiddly bulkhead door, "starboard side.

"6 P.M. Ship's head S. S. E., and a little more "speed put on the engines, the wind having de- "creased considerably.

"8 P.M. Weather inproving, sea going down, en- 62
"gines going good, slow.

"Midnight. Engines put ahead full speed, log "streamed; strong breeze with high head sea and "overcast sky, wind S. S. E."

Q. How much distance did you make during the day of the 21st? A. From Sunday mid-day till Tuesday mid-day we did 203 miles.

Q. Did the engines go full speed during Tuesday, the 22d? A. Yes, sir.

Q. All day? A. Yes, sir.

Q. That 203 miles represents full speed on Tues- day up to noon as well as what was made on Sun- 63
day and Monday? A. From Sunday mid-day till Tuesday mid-day she did 203 miles.

Q. What is the average speed of your vessel? A. Seven and a half knots.

Q. How did the steamer behave during the hurri- cane? A. Very well; I was surprised how well she did behave.

Q. Did she strain at all? A. She is bound to labor in a sea like that.

Q. What do you say as to the severity of the storm as compared with other storms you have been in? A. It was a very serious hurricane; I have been in

64 one other West Indian hurricane in about that position and I don't think there was much difference between them; this one was a little worse, I think, than the last one I had two years ago, which was reported in the American papers.

Q. How long have you been going to sea? A. Fifteen years.

Q. Have you ever been in a worse hurricane than this one? A. I don't think I have.

Q. Where have you been trading to during that time? A. For the last ten years in the West Indian trade.

Q. What was the location of the vessel at the time she met this hurricane? A. As near as I could
65 say it would be about 23.40 north and about 66.10 west.

Q. Was the tank filled on that voyage at all from New York to Trinidad? A. No, sir.

Q. Was it filled in Trinidad or Grenada? A. No, sir.

Q. Was it filled at any time after the hurricane prior to the 3d of September? A. No, sir.

Q. Was it examined at any time after the hurricane and before it was filled? A. It was.

Q. By whom, and when? A. By the chief engineer, and after the hurricane.

Q. Did he make any report to you of his examination?

66 Objected to.

A. No, sir.

Q. Did you know at any time prior to the time you filled the tank on the 3d of September that any of the rivets were defective? A. No indication at all.

Q. Had there been any rough weather from the time you left Trinidad or Grenada up to the time you discovered water in the hold? A. No.

Q. I suppose the ordinary business of this vessel is the transportation of merchandise and passengers, too, is it not? A. Yes, sir.

Q. Do you know what the construction is on the inside of the tank at the point where the defective rivet was discovered? A. I have never been inside of the tank at all. 67

Q. Was this tank tested in England before you left with the ship?

Objected to on the ground that the witness must not speak from hearsay.

A. Yes, sir.

Q. By whom, and when? A. It was tested before the vessel left the stocks by the inspector.

Q. What is his name? A. Sharp; one of Lloyds' inspectors.

Q. Was the vessel classed? 68

Objected to.

A. Yes, sir.

Q. What is her class? A. A1 at Lloyds.

Q. What kind of passage did you have from England to New York? A. Moderate.

Q. Was that tank filled on the voyage from England to New York? A. No.

Q. Had it ever been filled from the time she started on the voyage from England until you filled it on the 3d of September? A. No.

Mr. Black reads REDIRECT-EXAMINATION:

Q. Is there a hatchway to get into this tank? A. Yes, sir. 69

Q. With a hatch cover to it in the between-decks of the fore peak? A. Yes, sir.

Q. You say that this rivet with the head off was on the port side, about 18 inches from the side? A. Yes, sir.

Q. How far was it above the floor? A. About four feet, as near as I can say.

Q. Were there rivets in a line above it where the plates joined—was it a horizontal joint or a perpendicular joint? A. Horizontal.

70 Q. Were there rivets running across the ship on the same line? A. Not right across.

Q. Did they run as far as that one plate was where that rivet extended? A. Yes, sir; they were riveted through the whole plate of the bulkhead.

Q. How wide was the plate where this one broken rivet was? A. I can't answer that; the way the ship is built the plate might be cut up to fit in.

Q. Was it more than a foot wide? A. Yes, I should say it was.

Q. More than two feet wide? A. I should say it was fully two feet wide.

Q. Was it no more than that, in your judgment, or might it have been a little more? A. About
71 that.

Q. About how far apart were the rivets in that plate? A. About four inches, I think.

Q. As much as four inches? A. Of course this is only guesswork.

Q. I want you to give me your best judgment? A. From three and a half to four inches is the pitch from centre to centre.

Q. And in the plate of two feet there must have been as many as six or eight rivets? A. Yes, sir.

Q. And only one was broken? A. Yes, sir.

Q. And no more that you discovered? A. No more that I discovered.

Q. How long were you below in this No. 1 when
72 you went down to look after this water? A. Quite a little while.

Q. That is an indefinite period; was it an hour or a day? A. I should say I was down there a good hour.

Q. You say that this particular rivet was below the top of the cargo? A. Yes, sir.

Q. And that the cargo came against this collision bulkhead? A. Not right against it; we always leave a few inches; it was stowed up to the bulkhead, about two or three inches of the bulkhead.

Q. How high above the place where the broken rivet was, was the top of the cargo at that collision bulk-

head in the lower hold? A. About a tier and a half 73
of bags above; about three feet, I should think.

Q. Was it all on one level across the ship? A. Yes, sir.

Q. Did you remove the cargo from that bulkhead in order to find this broken rivet, or was it while you were moving the piles at the bilges in order to get at the limber boards that you discovered this broken rivet head? A. When we were looking at the bulkhead we heard the sound of water coming through this hole.

Q. Did you remove any of the cargo from that bulkhead to examine the whole of the face of the bulkhead? A. A few bags. The bulkhead there doesn't run right across the ship on the whole side; 74
there is a bulkhead across, and then there is a casing around in the middle which is the chain locker.

Q. How much of the face of the bulkhead does the chain locker cover? A. It takes about 6 or 8 feet.

Q. That is, you mean athwartships, running across? A. In the centre of the bulkhead.

Q. How much in height? A. From the bottom of the ship up to the between-decks.

Q. And is that all solid casing so that you couldn't look into it in any way except by going down from above? A. That is the only way to get into it.

Q. Did you go into that locker? A. I did not.

Q. Did any one go into that locker at that time? 75
A. I did not; it was full of chain.

Q. How close to the side of the chain locker was this broken rivet? A. Three or four feet.

Q. And there was an equal space, I suppose, between the starboard side of the chain locker and the starboard side of the ship? A. Yes, sir.

Q. Did you remove the cargo from that side of the chain locker so as to examine that side of the bulkhead? A. No, sir.

Q. You said you heard the water gurgling? A. Yes, sir.

76 Q. That indicated to you that the tank had not yet emptied itself to the level of that hole, didn't it? A. Yes, sir.

Q. Of course the upper part of the tank has much the larger capacity, has it not? A. Yes, sir.

Q. How soon after discovering this leak through this broken rivet was the tank pumped out? A. Immediately commenced.

Q. How long did it take before it was emptied? A. About an hour and a half.

Q. And during that time, of course, the water was still running? A. As I previously told you, we had plugged it up with a wooden plug or rivet of some kind.

77 Q. Was the bill of lading which was given for Christall's cocoa the same in form as the bills of lading you have already produced? A. Yes, sir.

Q. (Handing paper to witness.) Do you recollect that as being one of the bills of lading given for the cocoa? A. Yes, sir.

The bill of lading is maked for identification Libellants' Exhibit A.

Q. You say that this tank was tested by Mr. Sharp at the time the vessel was on the stocks; were you present? A. No, sir.

Q. All you know about it is what you heard from some one? A. No; I take it on the supposition that
78 the vessel would not have been allowed to have been past the inspection if it had not been witnessed or gone through the ordinary office of inspection.

Q. From the time you got charge of the vessel down to the time you filled this tank on the 3d of September, it had never been filled? A. It had never been filled.

Q. You say you personally made no inspection of this tank before it was filled after this storm that you have mentioned? A. No, sir; I did not.

Q. What was the previous port your vessel was at before she went to Trinidad on this voyage? A. Grenada, on the way down from New York.

Q. And then she went from Grenada to Trinidad? 79
A. To Trinidad; yes.

Q. What was her draft on the voyage down? A. 15 feet 3 forward, and 17 feet 4 aft.

Q. On the voyage from Trinidad or Grenada to New York, on which this occurrence happened, her draft was 14 feet 10 forward and 16 feet 10 aft before you put the water into the tank? A. Yes, sir.

Q. When you put the water into the tank what was her draft? A. We were at sea then and we couldn't ascertain exactly the draft; that tank ought to tip her 6 or 8 inches.

Q. When you emptied the tank you came to New York without anything there? A. Yes, sir. 80

Q. You didn't shift any cargo? A. No, sir.

Q. And didn't change the trim of the vessel at all? A. I had no other way to do it.

Q. And you arrived in safety? A. Yes, sir; only she didn't steam as fast; that is the only thing; the runs in the log book will show that.

Q. Give me the precise hour at which this tank was filled up on the 3d of September? A. 10 P. M. of the 3d; it was emptied at 6 A. M. of the 5th. The tank was filled for a period of thirty-two hours.

Q. What was the speed you made while the tank was filled? A. 247 miles the first twenty-four hours; the next day's run was 246 miles, an average speed of about 10¼ miles.

Q. What was the speed during the next twenty- 81
four hours? A. 241.

Q. That was when the tank was empty? A. Yes, sir.

Q. What do you mean here in the log by the "fiddly bulkhead door"? A. A division bulkhead for the passenger promenade deck. It is a door in the fiddly used in port for passing coal through.

Q. What is the fiddly? A. The upper casing of the boiler and engine-room.

Q. Is it below the main deck, or on the main deck?

82 A. The square casing that the funnel is supposed to ship on to.

Q. A piece of wood that is held in place by buttons or fastenings of some sort? A. A wooden bulkhead that is built up to prevent the heat from radiating out from the engine-room to the promenade deck. It has a door which can be take out so that we can coal the ship with convenience, and that door was carried away.

Q. And that door is fastened in by what? A. Bolts and cross bars.

Q. Which are accessible from the outside or inside? A. Inside.

Q. You are going to sail on this vessel on her out-
83 ward voyage? A. Yes, sir.

Q. When? A. On Tuesday next.

Mr. Black reads deposition of—

ERNEST C. LEGGE, recalled on behalf of libellant, as follows:

Q. In the business that the *Carib Prince* was employed in September, 1893, was she carrying cargo for the general public, whoever wanted to ship on her, or not? A. Yes.

Q. She was? A. She was.

Q. And did you on arrival at New York file in
84 the Custom House a manifest of the cargo you had on the voyage in question? A. Yes.

Q. Did that contain a true statement of what cargo you had on board? A. To the best of my knowledge.

Q. You intended it to be true, and you swore it was true, didn't you? A. Yes.

Q. Did you have copies of the bills of lading of the cargo which was on board? A. Yes.

Q. And those were what are called ship's copies, weren't they? A. Yes.

Q. What did you do with those on arrival in New York? A. I don't know what was done.

Q. Did you give them up to the ship's agents or consignees here, or did you keep them yourself? A. I gave them to the agents here in New York. 85

Q. Who attended to the ship's business? A. Yes.

Q. Was there a cargo list prepared for the agents, or did they make that list up? A. Prepared.

Q. Prepared for them? A. Yes.

Q. And checked off by anybody within your knowledge? A. No.

Q. You don't know whether it was or not? A. No.

Q. You testified here before and identified certain of the bills of lading which your counsel, Mr. Kirlin, produced? A. Yes.

Counsel for libellants calls upon counsel for the respondents or claimants to produce the bills of lading of the shipment in the suit of Middleton. 86

Counsel for the claimants regrets that he is unable to do so, as he has not any copies and does not know anything about the bills of lading.

Q. Please look at the bill of lading I now produce and see if you recognize that as a bill of lading of part of the cargo on this voyage of the *Carib Prince* (paper shown witness). A. Well, I can only say by the date of the voyage, that is all.

Q. Don't you recognize the signature of the agents? A. Yes, it is signed by the representatives of the Trinidad Steamship Line in Trinidad. 87

Q. Were those the same parties that signed all the bills of lading for the cargo? A. Yes.

Q. (Paper shown witness.) Will you please look at the paper shown you and say what that is? A. It is the manifest.

Q. Signed by you? A. Signed by me.

Q. And sworn to by you? A. Yes.

Q. Does the shipment to Middleton of 63 bags of cocoa, 54 bags, 15 bags, and six bags of cocoa appear on there?

Objected to as incompetent, the document being the best evidence.

88 A. Yes, it appears here.

Q. And was that cargo on board? A. Yes.

Counsel for libellants offers in evidence the bill of lading which the witness identifies.

Objected to as immaterial, irrelevant, and not being shown to have been signed by any person having authority to bind the ship by admissions.

Said paper is marked Libellants' Exhibit 1 of June 1, 1894, in Middleton suit.

Libellants' counsel also offers in evidence the ship's manifest in the same case.

Said paper is marked Libellants' Exhibit 2 of
89 June 1, 1894, in the Middleton suit.

Q. Please look at the bill of lading I now show you, and say whether all you have said in respect to the previous one in the Middleton case is not equally true as to that? (Paper shown witness).

Objected to as indefinite. Counsel ought to ask the witness the question.

Q. Please look at the bill of lading I now produce and see if you recognize that as a bill of lading of part of the cargo on this voyage of the *Carib Prince?* A. Yes.

Q. Don't you recognize the signatures of the agents? A. They are the signatures of the com-
90 pany down there that is doing the business for the Trinidad Steamship Company.

A. Are those the same parties that signed all the bills of lading for the cargo? A. I suppose so.

Said bill of lading is offered in evidence.

Objected to on the ground that it does not appear that it is signed by anybody authorized to bind the steamer by admissions.

Said paper is marked Libellants' Exhibit 3 of June 1, 1894, in the Gillespie case.

Q. Do you not find on this same manifest the entry in respect to the 75 bags of cocoa marked

"A. G. C." and "G. B. C.," mentioned in this bill of lading, consigned to order, and shipped by Andre Guiseppi & Co.? 91

Objected to as incompetent.

A. Yes.

Said invoice offered in evidence by counsel for libellants in the Gillespie case.

CROSS-EXAMINATION read by Mr. Kirlin:

Q. Who tallied the cargo in down there in Trinidad? A. The ship's officers.

Q. Did you sign any bills of lading yourself? A. No.

Q. Did you make any check of the bills of lading with the officers' receipts? 92

Objected to as immaterial and incompetent.

A. No.

Q. Did you check the manifest with the receipts? A. No.

Q. Who made up this manifest? A. Made up in the office of the ship's agents in Trinidad.

Q. Have you ever verified the correctness of the recitals in this manifest in any way? A. No.

Q. How, then, are you able to swear positively that this cargo was on board? A. I take it for granted

Q. You have not any actual knowledge about it, have you? A. No. 93

Q. The manifest was presented to you—

Objected to as leading.

Q. This manifest was made up by what persons? Give me the names. A. I don't know who it was made up by—by what particular person.

Q. In what office? A. Made up in the office of Turnbull & Stewart, in Trinidad.

Q. Who were Turnbull & Stewart? A. They do business in Trinidad—the company's business.

94 Q. What company? A. The Trinidad Steamship Company.

Q. And they make up this manifest and hand it to you? A. Yes.

Q. And you have not any knowledge as to whether it is correct or not?

Objected to as leading and improper.

A. I take it for granted.

Q. Except that they make it up? A. That they make it up, yes.

Q. You have to swear to a manifest every time you come into port, don't you? A. Yes.

Q. Every other captain does? A. Yes.

95 Q. Is it possible for a captain to verify every manifest he has to swear to? A. No, I can't say that it is.

Q. You could not do it unless you tallied in every bale of cargo and every package yourselt, could you? A. No; unless I——

Q. In order to have knowledge on the subject? A. Certainly; I would have to take it for granted. .

Q. In order to have actual knowledge you would have to tally in every package of cargo yourself, wouldn't you? A. Certainly I would.

Q. And you signed to this and swore to this on the representation of other people that it was correct? A. Yes.

96 Q. And that is all the knowledge that you have about it? A. That is all I have. Well, on the manifest, I only have to do with the passengers and ship's stores that I have to know is correct—the bonded stores and things that go under seal—a true statement of passengers in entering the port.

Q. Have you ever seen those bills of lading that have been exhibited to you to-day until you see them now? Those, I mean, that Mr. Black has produced to you? A. No; I have never seen those signed before.

Q. You have not any personal knowledge, have you whether the cargo mentioned in those bills of

lading was on board or not except what others have told you? A. What is that? 97

Q. You have not any personal knowledge that the cargo mentioned in those bills of lading was on board? A. No more than——

Q. More than that it appears on the manifest? A. Yes.

Q. You did not tally in cargo? A. No.

Q. Nor compared statements in the bills of lading with the mate's receipts? A. No.

Q. You have not any actual knowledge as to the correctness of those bills of lading? A. I have not.

REDIRECT-EXAMINATION read by Mr. Black:

Q. You have actual knowledge that you had cargo on board, haven't you? A. Yes. 98

Q. You had actual knowledge of your cases of Angostura bitters on board? A. Yes.

Q. And you had a mate there whom you put in charge of the duty of tallying in the cargo, didn't you? A. Yes.

Q. And part of his duty was to sign receipts for the cargo as it came on board, wasn't it? A. Yes.

Q. And you had every opportunity of examining those receipts and comparing them with the manifest, if you so desired, hadn't you? A. No; it is not so.

Q. You had the opportunity, had you not? A. No; I had no opportunity. 99

Q. Did you ever make a request for an opportunity?

Objected to, as the receipts would not be kept by the mate.

A. No.

Q. Did you ever ask for an opportunity to let you see the mate's receipts? A. No.

Q. Could you have had them if you had wished it? A. No, I could not. They were sent ashore.

Q. But you were in the habit of going to the agents on shore, weren't you? A. Yes.

100 Q. You could have got those receipts and compared them with the manifest, if you had so desired, could you not? A. No.

Q. Why could you not? A. These manifests are made up in Trinidad generally before the receipts are returned to the shore.

Q. Before the receipts are returned? A. Yes.

Q. What of that? Couldn't you have examined the receipts when they were returned? A. Yes; but they are not ashore before the ship leaves the place.

Q. Was the manifest aboard before the ship leaves the place? A. Yes.

Q. And if they are not ashore before the ship leaves, and the manifest was aboard before the ship
101 leaves, why couldn't you have examined them?

Objected to as cross-examination.

A. I don't know what you mean.

Q. You mean to say that, if you had wished to do so, it was impossible for you to have compared the entries in the manifest with the mate's receipts?

Objected to as cross-examination.

A. I don't understand what you mean.

Q. I ask you to answer my question. Do you mean to say that it was impossible for you to examine the mate's receipts and compare them with the manifest, if you desired to do so? A. If I was supposed to detain the ship for it, yes.

102 Q. If you had wished, could you have done it? A. If I wished to detain the ship for it.

Q. You had opportunity, had you not, at the time of the discharge of cargo, to ascertain every package that was on board the ship, if you had wished to do so—to do so when the ship was unloaded, when cargo was taken out, if you had wished to find out the fact? You could have done so if you had wanted to? A. I could if I had wanted to.

Q. You have done the business in the way that is customary in all shipping lines of which you have any knowledge?

Objected to.

A. No. Different ships do business different ways. 103

Q. So far as you are concerned in the ship *Carib Prince*, wasn't this the way in this particular voyage that business was done on all the voyages?

Objected to as immaterial.

A. I suppose it was.

Q. And it is the way that you are continuing to do it now?

Objected to as immaterial.

A. I have not made a voyage since then.

Q. But you have done it on other ships, haven't you? A. No. 104

Q. No other ships? A. No.

Q. Not since then? A. No.

Q. You have been ashore all the time? A. I have been home.

Mr. Black reads deposition of

EDWARD KEEYS, taken in behalf of the libellants, as follows:

Q. You are the chief engineer of the steamship *Carib Prince*, are you not? A. Yes, sir.

Q. How long have you been connected with her? A. Ever since the engines were first put into the ship. 105

Q. And were you on her on her trip from Trinidad in September of this year? A. Yes, sir.

Q. Describe the dimensions and the character of the construction of the tank in the fore peak of the steamer? A. The dimensions I haven't got.

Q. Give them as near as you can. A. The tank will be about 21 feet high from the forefoot of the ship to the top, across the top at the widest part would be 38 feet—that is the after side of it, the forepart of the tank it runs to nothing, in fact, it is almost triangular.

106 Q. Taking the perpendicular of that triangle, from the bulkhead to the bow, is how long on the top of it? A. I should say about 12 feet.

Q. And what is its capacity in gallons or tons of water? A. Eighty-three tons.

Q. How is the water got into it? A. Pumped in by a donkey pump.

Q. Through what? A. Through a hose pipe connected with the wash deck pipe and leading in through a tank filling pipe.

Q. That is a permanent pipe attached to the cover? A. Yes, sir.

Q. And running up to the main deck? A. Yes, sir.

107 Q. Is that the same pipe by which it is emptied? A. No, sir; it is emptied by a cast iron pipe leading from the tank to the engine-room, in connection with the ballast donkey, and controled from the engine-room.

Q. How long a time does it take to fill that tank? A. About four and a half hours.

Q. How long does it take to empty it? A. About one hour and a half.

Q. When was it first filled, to your personal knowledge? A. On the night of the 3d of September.

Q. At whose order? A. The chief officer's.

Q. When was it emptied? A. On the morning of
108 the 5th, between six and seven o'clock.

Q. What was the reason for emptying it? A. A broken rivet, and water coming in through the bulkhead and damaging the cargo.

Q. How was that first discovered? A. By the decrease of the water in the tank on the sounding.

Q. Who was it first discovered it? A. The carpenter.

Q. How did he discover it? A. By sounding the tank to see what depth of water there was in the ship.

Q. Had it been sounded previously to that to as-

certain whether it was full or not? A. Not to my 109
knowledge.

Q. How was it ascertained that it was full? A. By the air blowing out of what we call the air pipe funnel, as the water fills the space the air escapes by that.

Q. From the time it was filled down to the time the carpenter took the soundings on the morning of the 5th, had there been soundings taken, to your knowledge, in this tank? A. Not to my knowledge.

Q. What was the report of the carpenter as to the condition of the tank? A. I couldn't tell you.

Q. What did you first do yourself in reference to this tank after the report of the carpenter? A. Went down in the hold to have a look at it. 110

Q. Didn't you sound the tank? A. No, sir.

Q. Whom did you go down with? A. I went down with myself.

Q. Did you find any one there? A. The chief officer.

Q. Was he the only one there? A. The only one I saw there.

Q. Did he call you? A. No, sir; I don't think he did.

Q. How did you happen to go down? A. I was called by some one but I don't remember who it was.

Q. Had no report been made to you of the situation of things? A. No, sir.

Q. How did it come to your knowledge? A. I had 111
been called and told that this was the case; I couldn't say who it was.

Q. You got down in the No. 1 hold? A. Yes, sir.

Q. What did you find there? A. Water rushing out of the bulkhead in against the cargo.

Q. Did you find it as soon as you got down? A. No, there was a lapse of a few minutes or seconds, I couldn't say which.

Q. Did you go down in the lower No. 1? A. Yes, sir.

Q. Was that full of cargo? A. No, sir.

112 Q. Was there head room for you to stand up on the cargo? A. Yes, sir.

Q. Did you hear water swashing around there? A. Yes, sir; And saw it, too.

Q. Was it on top of the cargo? A. No, sir.

Q. How could you see it then? A. In the space between one division of cargo and the other; there was three different packages of cargo.

Q. And separated into different lots by what? A. Cocoa nuts, Angostura bitters and cocoa beans.

Q. Were they divided into lots in the stowage of them, so that one was separated from the other? A. I couldn't exactly tell you, but there was space there, for I could see the water washing about.

113 Q. Did you form any opinion as to how high the water was? A. Close upon three feet in the after part.

Q. That was enough to cover the floor, the three feet in the after part wouldn't leave it bare at the forward end, would it? A. No, sir.

Q. When was it that you first discovered that the bulkhead was leaking? A. The morning of the 5th.

Q. How did you find out that the bulkhead itself was leaking? A. We started to look for where the water was coming from, we knew it was escaping from the tank, and the water couldn't get out of the tank without a leak.

Q. Did you hear anything that located the point
114 where the leak was? A. Not exactly located the point; we formed an idea from the sound where it was.

Q. From the gurgling of the escaping water? A. Yes, sir.

Q. And then you moved the cargo so as to get a sight of it? A. Yes, sir; there was a whole partly open, and there was a bore of water coming; the hole was full of water and it was spurting out with considerable force, showing there was a big head of water behind it.

Q. The first thing done to stop this leak was

what? A. Drove the rivet back and put in the wooden plug. 115

Q. After that how was the hold emptied of water? A. By the ballast donkey.

Q. Did you see the cargo when it came out in New York? A. Some of it.

Q. Did you see the cargo that came out of No. 1? A. Saw it in the hold.

Q. Did you take any account of the number of packages that were damaged? A. No.

Q. That bulkhead, as I understand, is made of sheets of iron or steel bolted together, forming the entire face, isn't it, and reinforced by some angle iron or T-iron to give shape and stiffness? A. Yes, sir.

116

Q. And that rivet that was broken was located where on that bulkhead? A. About three or four feet from the bottom of the tank, and eighteen inches to two feet from the ship's side.

Q. You are now speaking of the tank? A. Yes, sir; of the bulkhead.

Q. Are you speaking of the tank side of the bulkhead or the No. 1 side of the bulkhead? A. As regards the depth, the cargo side of the bulkhead.

Q. How high above the level of the floor in No. 1 was this rivet which was broken? A. Three or four feet.

Q. Was it one of a lot of rivets forming the fastening for these plates in that location—were there a great many other rivets close by it? A. About six. 117

Q. How far apart do those rivets run? A. Three to four inches, horizontally.

Q. How far in the perpendicular? A. About two feet from any other seam of rivets.

Q. On the other seams were the rivets spaced about the same distance apart? A. Yes, sir; ordinarily.

Q. And about how far do you think the rivets were apart? A. Three to four inches.

118 Q. And that is the only rivet that you found was in any way defective? A. At that time; yes, sir.

CROSS-EXAMINATION read by Mr. Kirlin:

Q. Were these rivets rivets joining the plates of the bulkhead together? A. No, sir.

Q. How far away from these rivets was there any join in the bulkhead plates? A. About six inches below it, and about two feet six above the knee tie.

Q. Please explain to us what this row of rivets was for? A. What is termed a knee tie, a stiffening knee to support the bulkhead.

119 Q. Where is that tie? A. Tight to the ship's side on a fore and aft beam, and extends at right angles across the bulkhead.

Q. How far? A. Two feet.

Q. How far does it extend up along the angle iron beam on the side of the ship? A. About the same distance.

Q. Of what is that composed? A. Plate iron or steel, with a reverse angle bar to it.

Q. How thick is that? A. About $\frac{3}{8}$ of an inch thick.

Q. How wide is the strap? A. Do you mean the knee?

Q. I mean the strap that the knee tie is fixed on
120 to? A. That is a three and a half inch angle bar.

Q. And what is the knee itself? A. Plate iron.

Q. What is its shape? A. Triangular.

Q. What is it fastened to? A. Fastened to the ship's side in one case.

Q. Through the strap? A. Through the fore and aft beam.

Q. As I understand it, the knee tie is a triangular piece of iron with one edge turned up at right angles to the face of the tie, and that this angle bar, part of it, is riveted fast to the bulkhead, and that the other edge of it is attached to the beam of the ship, and that the rivet that broke was one of the

rivets by which this knee tie was fastened to the bulkhead? A. Yes, sir. 121

Q. Which rivet was it? A. One at the extreme edge of the bar, outer end of the reverse of the angle bar; it was the extreme end one of the lot; there are about six, I think.

Q. You said that this outer extreme end one was the only one you found leaking at that time? A. Yes, sir.

Q. Mr. Black asked you whether the plates of the bulkhead were not bolted together and you answered yes; I suppose you mean riveted? A. Yes, sir.

Q. What is this chain locker made of? A. Iron.

Q. Is it water tight, too? A. As far as I can say, it is. 122

Q. Is it riveted on to the bulkhead? A. Yes, sir.

Q. How is it attached at the bottom; is it connected with the tank? A. I couldn't say for certain, but I should say it was angle-barred all around.

Q. Is it all iron? A. It is all iron.

Q. And the plates are all riveted the same as the bulkhead? A. All riveted the same as the bulkhead.

Q. Is this collision bulkhead clear past the bend of the bow, or is it right in the bend of the bow? A. Just on the radius of the bow; goes right across where she takes the sweep for the bow.

Q. If she was headed into a heavy sea, would there, or not, be any considerable pressure on the sides of the ship just about where this tie is? 123

Objected to as incompetent, irrelevant and immaterial.

A. Yes. I should say there would be a strain on the ship's bow caused by the resistance.

Q. Isn't there an expression that is used for that among engineers? A. I can't say that there is.

Q. Is it sometimes called "panting"? A. I believe so, but it is not used now.

Q. Do you know what became of the head of the

124 rivet that was gone? A. Yes, sir; the chief officer took it.

Q. Did you see it picked up? A. I did.

Q. Where was it found? A. On one bag of cocoanuts.

Q. Where with reference to the hole? A. Right down under it.

Q. How far away from it? A. I couldn't exactly say the distance now; I didn't take that much notice. I saw it picked up; that is all.

Q. Have you that rivet head? A. I have not, sir.

Q. When was it picked up? A. After the water was stopped, after we got the water stopped.

125 Q. Is that the rivet head that you saw picked up off the bag (producing same)? A. Yes, sir.

Mr. Kirlin: I offer that for identification.

It is marked Claimants' Exhibit 6.

Q. Were all the rivets in that knee tie countersunk on both sides? A. To the best of my knowledge.

Q. Were they countersunk on the hold side? A. Yes, sir.

Q. And this broken piece indicated that it had broken in the countersunk part of the rivet? A. Yes, sir.

126 Q. Have you your log book for the voyage from Trinidad to New York? A. Yes, sir.

Q. What entries have you got for the 20th, 21st and the beginning of the 22d of August, during the time the steamer was in the hurricane?

Objected to as immaterial and incompetent.

Q. Were you subpœnaed to produce your log? A. Yes, sir.

Q. Where is that subpœna? A. Here it is.

Mr. Kirlin: I offer the subpœna in evidence.

It is marked Claimants' Exhibit 7.

Q. Did you bring the log here pursuant to that subpœna? A. Yes, sir. 127

The entries in the log are as follows:

" Engines racing the whole of the 20th.

" 21st. Engines slow; 12.10, high seas breaking over " ship on port beam, supplying oil for W. C. and " oil bags; storm increasing and sea rising.

" Heavy sea and gale on port beam, ship taking " very heavy water on board.

" 5.30, half speed. Hurricane moderating a little.

" Wind and sea moderating. Engines racing.

" 22d. Full speed at 12.15. Heavy list to star- " board. Working coal of starboard bunkers.

" H. & M. Guides warm.

" Engines racing a little. 128

" Steaming badly.

" Steaming better."

Q. What number of revolutions does the vessel make at full speed per minute? A. 73 and 74.

Q. What was she making during the 20th? A. 68 and 67.

Q. What did she make during the 21st? A. 27.

Q. Have you got a record of what distance she made on the 21st? A. No observation.

Q. What number of revolutions did she make on the 22d? A. 64 in the morning and 67 at night.

Q. When did you ease down; at what hour? A. Ten minutes past twelve on the morning of the 21st.

Q. When did you start again full speed? A. At a quarter past twelve on the morning of the 22d. 129

Q. What was the condition of the weather during those two days? A. Hurricane.

Q. Was it continuous? A. Yes.

Q. Did you examine the ship after the hurricane? A. I did, sir.

Q. Where? A. Fore peak.

Q. Where else? A. Engine-room, stoke holes in the sides of the ship and the tank bilges.

Q. Did you go down into the tank in the fore peak? A. Yes, sir.

130 Q. What time of day? A. Between nine and ten o'clock in the morning.

Q. Did you make an examination of the interior of the tank? A. Not a practical examination. I made an examination just to satisfy myself, to have a look at the formation of the tank principally; it was the first time I had seen it; I didn't go with the intention of examining whether there was any damage or not, but I made that my business when I was down there.

Q. Did you examine to see whether there was any damage? A. Yes, sir.

Q. Did you look at the collision bulkhead? A. Yes, sir.

131 Q. Did you look at the knee tie? A. Yes, sir, wherever there were rivets.

Q. Was there any coating or wash on the forward side of the bulkhead? A. Yes, sir, a coating of Portland cement.

Q. Was that over all the rivets? A. The rivets and the bulkhead as well.

Q. Did you notice that any rivets were started on the inside? A. I couldn't tell that any had been started.

Q. Had the cement been started? A. Not that I could see.

Q. You say you examined wherever there were rivets on the inside of the tank? A. Yes, sir.

132 Q. How long were you down there? A. Upwards of an hour.

Q. Do you know whether the rivets are countersunk on the tank side of the bulkhead or not? A. Yes, sir.

Q. Did you go in the No. 1 hold at all? A. I was there after the cargo was out?

Q. Did you examine the bulkhead there? A. I saw it tested by the surveyor.

Q. Where? A. In New York.

Q. I meant in Trinidad after the storm, before you started back to New York? A. Oh, no, sir.

Q. You were not in the lower hold then? A. Not in the lower hold then. 133

Q. If there was any defect in that rivet, which has been marked Claimants' Exhibit No. 6, before it fell off on to the bag of cocoa, would it have been discoverable by inspection from the No. 1 hold, looking at it as it was countersunk in place?

Objected to as immaterial and incompetent.

A. No, sir.

Q. Why not? A. Because the head of the rivet is hammered close to the face of the plate.

REDIRECT-EXAMINATION read by Mr. Black:

Q. On what day was it that you went down into this tank first after this storm? A. On the morning of the 22d of August. 134

Q. The vessel was then at sea? A. Yes, sir.

Q. Did anybody go with you? A. No, sir.

Q. And it was your first visit to the interior of the tank? A. Yes, sir.

Q. How did you get down into it? A. Through a manhole door.

Q. Was there a ladder to go down into it? A. Yes, sir; three ladders.

Q. Inside? A. Inside.

Q. Permanent? A. Permanent ladders.

Q. Did you carry lights with you? A. I did.

Q. In what shape? A. In the shape of a torch and a lantern. 135

Q. And you say you found it all lined with Portland cement? A. Yes, sir.

Q. How thick was that lining? A. A heavy wash —washed with a solution of cement in paste form.

Q. What would you take that to mean in thickness, a heavy wash? A. It materially differs; depends upon the surface it is put on. Put a coat of cement about one-sixteenth of an inch thick, and about the rivets would be thicker and clumsier.

Q. You found nothing to indicate any starting of the cement? A. According to appearances.

136 Q. Well, you saw it and you are telling us what you saw? A. Yes, sir.

Q. Was there cement on all the sides of the tank as well as the bulkhead? A. Yes, sir.

Q. And on the floor of it? A. There is no floor in it.

Q. It comes down to a flat surface on the bulkhead side, doesn't it? A. No, sir; it is wedge-shaped at the bottom of the ship.

Q. Was that portion of the tank which formed the bottom of the tank also covered with cement? A. Yes, sir; not only with a wash but with a body of cement.

Q. Was the top of it, which is the underside of
137 the between-decks there, also washed with cement? A. I am not sure of that.

Q. Could you by means of these ladders examine every portion of that interior? A. Yes, sir; and without the assistance of the ladders.

Q. Why, part of it is twenty feet high, isn't it? A. Yes; but you have got intermediate stringers that you could stand on.

Q. This particular beam to which this angle iron is attached is inside of this tank? A. Yes, sir.

Q. At what height above the bottom of the tank is that beam? A. From the ship's bottom?

Q. Yes? A. Six feet or more.

Q. Did you look at that beam at all? A. I was
138 on top of it.

Q. Was that also covered with cement? A. Yes, sir.

Q. Was the cement perfect there? A. Apparently.

Q. I understand you that that angle iron which connects the beam with the bulkhead is riveted to the bulkhead and to the beam, but not to the side of the ship? A. No, sir.

Q. Does that beam run athwartships? A. Fore and aft.

Q. How many of those beams are there in that tank at that height? A. Two.

Q. One on each side? A. Yes, sir.

Q. And an angle iron on each side? A. Yes, sir. 139

Q. Is one of the angles of that angle iron a right angle? A. Yes, sir.

Q. That right angle comes at the junction of the bulkhead with the beam, doesn't it? A. Yes.

Q. And the rivet which was gone, was it at the right angle end of the angle iron, or was it at the other angle end? A. At the extreme end of the angle iron.

Q. That was not at the right angle end? A. No, sir.

Q. Is the right angle end of the angle iron nearest the centre of the ship, or nearest the side of the ship? A. Nearest the side of the ship.

Q. So that the rivet which was gone was nearest 140 to the centre of the ship? A. Nearest to the centre of the ship.

Q. Were you in the vessel at the time the survey was held on her after her arrival in New York? A. I was.

Q. At that time there were other rivets discovered weeping, weren't there? A. A considerable number of them.

Q. There was also another rivet found gone? A. Yes, sir.

Q. Where was the one that was found gone located? A. Next to the one that was gone.

Q. Where were the weeping ones? A. On the other side of the ship.

Q. How many weeping ones were there? A. Five 141 or six.

Q. How many did you find with heads gone and holes there? A. Only the one.

Q. Didn't you find another rivet hole besides the one you plugged up at sea? A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. Have you any record of what you did see when the survey was held? A. No, sir.

Q. You made no memorandum of what you saw? A. No, sir.

Q. I understand that at the time you went into

142 the tank you confined your examination entirely to the tank sides, and didn't go into the No. 1 hold at all at that time? A. Couldn't get into No. 1 hold for the cargo.

Q. And that after you got to your destination and delivered your cargo, you then did not go into No. 1 to make any examination of that bulkhead? A. No, sir; didn't think it necessary.

Q. Are you familiar enough with qualities of iron to say whether this rivet is of good quality or not (Claimants' Exhibit 6)? A. I am, sir.

Q. Is it good or not? A No, sir.

Q. What is its defect in your judgment? A. Inferior iron, short and brittle, without a fibre.

143 Q. Has that been annealed? A. Yes, sir.

RECROSS-EXAMINATION by Mr. Kirlin:

Q. Might not this condition of fibre have been produced by too much hammering when it was annealing? A. Yes, sir.

Q. When a line of rivets are put in in construction they usually work on three at a time, do they not? A. Yes, sir.

Q. And every time they put in a new one they tighten the one behind it, do they not. A. They tighten the second one behind it; yes, sir.

Q. As the iron is cooling, if the second one behind
144 is hammered too much, that will produce a crystalline character in the iron, will it not, and will give it the appearance of being short and brittle? A. Yes, sir.

Q. That is the appearance that this had? A. Yes, sir.

Q. So that it would be difficult to tell from its appearance now whether it was originally good or not? A. The condition it is in you could not tell well; it is rusted up and you cannot see the fibre.

Q. When the tank was filled, do you know whether the manhole was caulked or not? A. No,

sir; the manhole is not caulked; the manhole is 145
put in with a water and steam-tight joint by means of six bolts.

Q. You know that that was water tight before the tank was filled? A. Yes, sir.

By Mr. Black:

Q. Do you notice that this rivet has evidently been headed up one-sided, that is, the top of it has not spread evenly over the portion which has been countersunk? A. Yes, sir.

Q. Can you tell by looking at the rivet whether it has been hammered while it was cold or hot, or half cold or half hot? A. I cannot tell.

Q. If it is properly heated and hammered in that 146
condition the iron spreads evenly, doesn't it? A. Not in all cases.

Q. In what case might it not spread evenly? A. A man might hit it on the wrong side.

Q. If an expert riveter were doing the work it would be so, would it not? A. Not in all cases.

By Mr. Kirlin:

Q. Isn't there an inspection of rivets to find out whether they are properly put in before they are passed? A. There is an inspection of rivets to find out whether they are tight before they get paid for them.

Q And if the inspection didn't discover a defect of 147
that sort it wouldn't be likely to exist, would it? A. You couldn't see the other side. The holes might not be even.

Q. There might be a little difference between the distances without there being any damage done, might there not? A. Yes, sir. That would indicate (the exhibit) that one end of the rivet had been up and one down.

By Mr. Black:

Q. Does not that mean that the holes have not been bored true? A. That is the exact meaning of it.

148 Q. Doesn't it indicate that the drifting iron has not been used under such circumstances? A. No, sir.

Q. If the drifting iron was used the holes would come opposite, would they not? A. Would spring into shape, certainly—spring the plate—spring the two faces open.

Q. Did you put the plugs in these holes? A. I was there when it was put in.

Q. Did you see the holes? A. Yes, sir.

Q. Did the holes come true? A. The holes did not come true; they cut them out so they would come true.

Q. Who did? A. The boilermakers.

149 Q. When? A. When the repairs were made.

THOMAS CONGDON, being duly sworn, examined as a witness for the claimants, testifies:

By Mr. Kirlin:

Q. You are a Lloyd surveyor in this port? A. Yes, sir.

Q. Also a shipbuilder? A. Brought up as one.

By the Court:

Q. Iron shipbuilder? A. Iron and wood.

Q. You know all about iron ships—the build of
150 them? A. I think so.

By Mr. Kirlin:

Q. How long have you been a Lloyd surveyor in this port? A. About thirty-eight years.

Q. Did you survey the *Carib Prince* at the end of her voyage here in September, 1893? A. Yes.

Q. What was the trouble? A. There had been a leak in the forepeak bulkhead.

Q. Did you see the hole? A. I saw the rivets that had been started. I didn't see the rivets taken out.

Q. Was one gone? A. One was gone.

By the Court:

151

Q. And others—— A. Strained and started and had been leaking.

By Mr. Kirlin:

Q. How many others? A. Five or six.

Q. These were in the strap, were they, in the reinforcing brace? A. There were two or three in the vertical stiffening bar, we call it, and two or three, or three or four, in an angle iron attaching a stringer plate to the bulkhead, or bulkhead to the stringer plate.

Q. Was the other end of the rivet knocked out? A. No, the after end was out; the remaining end was in the hole. 152

Q. Did you notice any irregularity about the holes for that place? A. I did not.

Q. Was it repaired at that time? A. No; the repairs were deferred until the first or second voyage after that. They did some little caulking temporarily.

Q. What was done with the hole where the rivet was broken off? A. I think a bolt was put in there.

Q. Temporary repairs? A. Temporary repairs.

Q. Did you make further survey of her at a later day? A. At a later day, when the work was all completed, I made another survey; had the tank filled and tested, and it proved to be tight.

Q. Did you see the engineer on both occasions? 153
A. Yes, I think I met him on each occasion that I was involved.

Q. Did you hear anybody say anything about the holes being uneven? A. No, I did not.

Q. Who made the repairs? A. I could scarcely tell you that.

Q. Handren & Robins? A I really don't know.

Q. Do you know what the requirements of Lloyds are as to passing a tank before the vessel is classed? A. I think I do, yes.

Q. Do you know?

Objected to as immaterial.

154 A. I know just exactly what they are.

The Court: There may be somebody there who didn't test it right.

The Witness: I am sure they wouldn't do that. I am sure it was done.

Q. What are the requirements of the rule?

The Court: She passed Lloyds I know, but what examination was made I don't know.

The Witness: The ship wouldn't have been classed unless it had been complied with.

The Court: Unless somebody had certified it had been complied with.

The Witness: Yes, sir.

155 Taken subject to objection.

Q. What was the test required? A. When the vessel is built and the tank completed, it is filled with water to the very top and a stand pipe is put in on the top, five or six or seven feet high, and the tank is filled, and when the water comes over the top of that pipe it is said to have its pressure on, which tests all the workmanship and material and everything in connection with that tank and proves it fit to hold and carry this depth of water. That is about the whole thing.

Q. Could a vessel have been classed unless that was done?

156 Objected to as immaterial.

Q. What class of vessel is the *Carib Prince?* A. She is a very first class vessel; I haven't seen a better one of her kind.

Q. Have you examined the workmanship about her? A. I have been on board of the ship two or three times.

Q. What do you say as to the workmanship? A. I say it is very good.

Q. Do you know the builders? A. If you name them I might know their reputation. I know them all over there.

Q. Shaw Brothers? A. Yes, men of good reputa- 157
tion.

Q. Can you form any judgment as to what was the cause of the leak that you saw when you surveyed the vessel? A. No, I do not, really; I haven't formed any judgment on that at all.

Q. Did you notice from which end of this strap the rivets appeared to have started first, whether the parts towards amidships or the part towards the side of the ship? A. I think the side of the ship, as far as I can remember.

CROSS-EXAMINED by Counsel for Libellants:

By Mr. Black:

158

Q. What was the date of your first visit to this steamer for the purpose of looking at this bulkhead? A. In September, last year.

Q. Did you make a record of your inspection at that time? A. I made a short report of it.

Q. To whom did you make the report? A. To the agent, Mr. Seager, only half a dozen lines.

Q. Have you got that report with you? A. No.

Q. Have you a copy of it with you? A. I have a copy in the office.

Q. With you? A. No, I have not.

Q. Do you distinctly recollect how many rivets you found missing there? A. I distinctly recollect one being partly gone, the one I spoke of just now, and the others I stated in a general way; two or 159
three in the vertical bar and three or four or five——

Q. Absolutely gone? A. No.

Q. How many did you notice were absolutely gone? A. One partly gone.

Q. Only one partly gone? A. That is all I saw.

Q. And part of the iron was still in the hole? A. Part of the iron was still in the hole.

Q. Did you notice any wooden plugs in any part of the bulkhead at that time? A. Not when I visited the vessel, not on my visit.

Q. Was there any cargo in that hold when you

160 visited it? A. Not enough to prevent my seeing the bulkhead.

Q. Was there any cargo there? A. I could scarcely tell you; I don't quite know; I could see near the whole of the bulkhead.

Q. You didn't see the whole of it? A. I think I must have done so.

Q. Was there any cargo there? A. I couldn't tell you.

Q. If the cargo was there it would prevent your seeing some? A. There might be some cargo lying on the top of the tank, but not enough to prevent my seeing the bulkhead.

Q. Did you go into what you call the collision
161 compartment? A. I went on top of the tank in No. 1 hold.

Q. Has the tank got a top in No. 1 hold? A. Yes, the tank has.

Q. Is that a ballast tank that runs the length of the ship or the tank in the forepeak you speak of? A. The No. 1 tank, which is not the forepeak tank at all.

Q. I am asking about the forepeak tank. Did you examine the bulkhead of that? A. I had to go into No. 1 hold to do that, I tell you.

Q. Were you in the forepeak as well? A. No.

Q. You were not on top of that tank, were you? A. No. That is the upper deck, you know.

162 Q. Are you sure of that? A. Yes.

Q. Isn't it the between-decks? A. No.

Q. When you got into No. 1 hold was there cargo there? A. There may be some cargo.

Q. Was there; do you know whether there was? A. I couldn't tell you; I do not know what was in the hold of the ship; I didn't go there to see cargo; I went to see the bulkhead.

Q. Did you go into the lower hold or in the between-decks of No. 1? A. There is no between-decks of No. 1; she has got beams there, you know.

Q. How many rivets did you notice that were defective? A. Just as I have told you; two or three I

think in the vertical bar, and three or four or five in 163
one of the side stringers connecting it to the bulkhead. That is all I have a recollection of.

Q. What was the nature of the defects in the vertical bar? A. The rivets were started, and in the vertical bar was the one that was partly gone.

Q. What do you call the vertical bar of that bulkhead? A. The stiffening bar.

Q. And the stiffening bar and vertical bar are the same thing? A. Yes, quite so.

By the Court:

Q. When you went on with the examination was your attention called to the hole where the rivet was? A. I saw it. 164

Q. Your attention was called to it? A. I could see it any way.

Q. Did anybody call your attention to it? A. I don't know that they did. I saw it.

Q. So you can swear the rest of the bolt was there? A. In the hole.

Q. In the hole of the rivet? A. Yes; it was broken off.

Q. They swear here it had been plugged and they had driven in a plug? A. There was no plug when I saw it.

Q. There could be no plug if the bolt was there? A. It was too short to hold the plug.

Q. Are you sure the rest of the bolt hadn't got 165
out? A. I couldn't see any.

Q. And there was a bolt there? A. There was a bolt there.

Q. You didn't examine the part that was broken off of the bolt? A. No, sir.

REDIRECT by Counsel for Claimants:

By Mr. Kirlin:

Q. In putting a new rivet in holes where there has previously been a rivet do you know whether it

166 is usual to ream the hole before a new rivet is put in? A. The hole should be cleaned out or reamed out or rimed out, whichever it is.

Q. Is that the usual course? A. That is the usual thing to do.

Q. When rivets are put in first are they hot or cold? A. Red hot.

Q. If the holes are not true can you put in a full size rivet? A. If the holes are not true you can scarcely get in the full size rivet.

Q. When the rivet is hammered it fills up the whole place tight? A. It fills the hole.

RECROSS by Counsel for Libellants:

167

By Mr. Black:

Q. Is it necessary to ream a hole if the vessel is almost new? A. It is necessary to clean out the hole.

Q. I said ream it out? A. Ream it out. Where water has been fastened to a hole and rust has set up you have got to ream out that to clean the hole.

Q. That is to take the shaving off to get a bright surface again? A. That is called cleaning out the hole.

Q. You could do it with a file as well as with a reamer? A. A file is not used for that purpose.

168 Q. I didn't say whether it was used; I said you could do it with that, couldn't you, for cleaning it? A. Of course you can do it.

By the Court:

Q. When the bolt was in there as you saw it could you tell whether those holes in the two places were true? A. Not unless the entire bolt was out.

Q. Therefore you don't know whether they were true? A. No, sir.

Mr. Kirlin reads the deposition of JOSEPH SHORT, 169
taken on behalf of the claimant, under a commission:

FIRST INTERROGATORY.—State your name, age, residence and occupation. What experience have you had in shipbuilding, and what, if any, connection had you with the building of the steamship *Carib Prince?* When and where was she built? A. My name is Joseph Short. I am thirty-seven years of age, and reside at Sunderland. I am a shipbuilder. I have had about twenty years' experience in shipbuilding. I took general management of the yard during the construction of the *Carib Prince.* She was built in the spring of last year at Pallion, Sunderland, by our firm, Short Brothers. I 170
gave practical supervision myself to the building of this and other ships. I am a practical shipbuilder. I had particular charge of the superintendence of this ship.

SECOND INTERROGATORY. State the position and construction of the said steamship's bulkheads and tanks. If you state that there is a bulkhead between No. 1 hold and the peak tank, constructed with iron rivets, state from what source said rivets were procured, and what, if any, means were taken to insure their soundness? A. There is a bulkhead dividing the fore hold and the fore peak tank. The rivets were procured from Samuel Tyzack & Company, Limited, Monkwearmouth, who supply nearly 171
the whole of the shipbuilders in the north of England. Rivets coming from Tyzack & Company are usually tested by bending them when cold and flattening them; and there was the general supervision of the foreman and myself in the usual way.

THIRD INTERROGATORY.—Describe particularly any tests made of the said rivets, bulkhead or tank, stating what part you personally took in such tests, what, if any, representatives of other parties were present, and what the condition of the parts tested appeared by such tests to be. What was the condi-

172 tion of the said bulkhead and rivets when the steamship left the builder's yard? A. I cannot remember that I made any particular test of the rivets in the bulkhead. Rivets coming from Tyzack & Co. are usually tested. We test rivets occasionally when they come into the yard into stock. We do not test any particular rivets in any particular job. But from time to time rivets are tested to see that the rivets supplied to us are of good and proper quality. The method of testing is by bending cold and flattening. I have already described that. The test is done in the blacksmiths' shop, and it would be reported to me if the rivets were not right. I do not remember testing any particular rivets in that bulk-
173 head. The condition of the said bulkhead rivets when the steamer left the builders' yard was perfect. The steamer was perfectly sound in every way when she left our yard. The bulkhead and tank were tested in the usual way by the rivet tester with a hammer, and then afterwards tested by Lloyds' representative and the owners' superintendent with water, as required by Lloyds' rules, and found perfectly in order.

FOURTH INTERROGATORY.—If you know of any other matter or thing to the advantage of the claimant in this action, state the same as fully as if you had been specifically asked about it? A. My opinion is that if this bulkhead is found leaking, it is utterly
174 impossibly for it to have occurred excepting through some damage or other that has occurred since she left our place. It is utterly impossible for it to have occurred in any other way except through damage. She might be damaged by a strain, or bad weather, or a blow.

Mr. Black reads cross-interrogatories as follows:

FIRST CROSS-INTERROGATORY.—What number of rivets were there in the fore bulkhead forming the after end of the fore tank? How many rows of rivets were there to each lap? How far apart horizon-

tally were the rivets? How far apart were the rows vertically and horizontally? A. The rivets are all spaced in accordance with Lloyds' rules for watertight work. There is one row of rivets to each lap. 175

SECOND CROSS-INTERROGATORY.—Describe the location of each rivet, and state through what it passed and how many of all said rivets you saw driven or drove yourself? A. I cannot describe the location of each rivet. Each rivet passed through two plates and angles. The riveting was properly done, in the usual way, and I exercised a general practical supervision.

THIRD CROSS INTERROGATORY.—Where were you when each of those particular rivets was driven or headed; if you say you were not all the time there present, state what portion of the time you were not present there at that bulkhead and how many of said rivets of said bulkhead you did not see driven, or what proportion? A. The bulkhead received my general supervision in the ordinary course, as a shipbuilder. 176

FOURTH CROSS-INTERROGATORY.—Did you use a drift pin or drift iron in constructing that fore tank? A. There would be a drift pin used in the construction of the fore tank, whenever necessary, in the ordinary course.

FIFTH CROSS INTERROGATORY.—Did you see a drift pin or drift iron used in constructing that fore tank? A. I did not, to my recollection, see the drift pin used in the construction of that fore tank. It was certain to be used when necessary. 177

SIXTH CROSS-INTERROGATORY.—Did any one use a drift pin or drift iron in constructing that fore tank? A. I should certainly say that the drift pin was used when necessary.

SEVENTH CROSS-INTERROGATORY. — How many times was the drift used in constructing that fore tank? A. I cannot tell how many times the drift pin was used in constructing that fore tank. It would be used whenever necessary, as I said before.

178 EIGHTH CROSS-INTERROGATORY.—What occasion was there for using the drift in such construction? A. The occasion for using the drift pin in such construction was to clean and smooth out the hole.

NINTH CROSS-INTERROGATORY.—Where were you when the drift was used in such construction? A. I could not possibly tell where I was when the drift pin was used in such construction. I would be about the yard somewhere.

TENTH CROSS-INTERROGATORY.—Were the rivets headed up cold or hot, or some cold and some hot? A. The rivets were headed up all hot.

ELEVENTH CROSS-INTERROGATORY.—Did you see all the rivets inserted in the rivet holes in that fore
179 tank? If nay, how many were inserted that you did not see? A. I did not see any of the rivets inserted in the rivet holes in the fore tank.

TWELFTH CROSS-INTERROGATORY.—How do know that all the rivets were hot? A. I know the rivets were hot because they could not be put in cold in that particular job, the size of the rivets being $\frac{3}{4}$-inch.

THIRTEENTH CROSS-INTERROGATORY.—Will hammering on a cold rivet make the iron cold short? A. If "cold short" means brittle, hammering on a cold rivet will make it so, if it is sufficiently hammered.

FOURTEENTH CROSS-INTERROGATORY. — Will a
180 buckled plate cause any strain on a rivet greater than one that is not buckled? A. A buckled plate will not cause any strain on a rivet greater than one that is not buckled, provided that the plate is close home to that to which it is riveted, at the point of riveting.

FIFTEENTH CROSS-INTERROGATORY.—What is the method you employed for bringing rivet holes which were not fair into line? A. The method employed for bringing into line rivet holes that are not fair is by clearing them out with a rimer.

SIXTEENTH CROSS-INTERROGATORY.—How many rivet holes did you see faired in the fore tank con-

struction? A. I cannot say how many rivet holes I saw faired in the fore tank construction. They were faired always when necessary. 181

SEVENTEENTH CROSS-INTERROGATORY.—Will you swear of your own personal knowledge that no rivet holes were fared in the fore tank bulkhead, braces, beams or angle irons, or either of them? A. I will not swear of my own personal knowledge that no rivet holes were faired in the fore tank, braces, beams or angle irons, or either of them. They were faired when necessary. Some would be faired.

EIGHTEENTH CROSS-INTERROGATORY.—What watch did you give to the riveting of the fore tank to prevent the rivets becoming cold short? A. I gave a general supervision to the riveting of the fore tank, as a shipbuilder, and by a practical foreman, Woolard. 182

NINETEENTH CROSS-INTERROGATORY.—(*Nil*).

TWENTIETH CROSS-INTERROGATORY.—If you saw that a rivet was being hammered too much what did you do? A. I never saw a hot rivet hammered too much.

TWENTY-FIRST CROSS-INTERROGATORY. — How many times have you been asked about the rivets used on the *Carib Prince* before you testified and by whom; have you ever written anything about the said rivets; if yea, to whom and when; produce a copy of what you wrote and say if you have done so and hand it to the Commissioner to be annexed to your deposition and say if you have done so? A. Before I testified I have been asked about the rivets used in the *Carib Prince* twice by the representatives of the *Carib Prince*. I have never written anything about the said rivets. 183

TWENTY-SECOND CROSS-INTERROGATORY.—Whose employment are you in; whose employment were you in while the *Carib Prince* was being built; what responsibility for bad workmanship or bad material in the *Carib Prince* exists in you or your employer or those you were employed by; if by

184 written contract annex a copy thereof and say if you have done so? A. I am and was at the time of the building of the *Carib Prince* a partner in the firm of Short Brothers. Responsibility for bad workmanship or bad material exists in me as a shipbuilder. This particular bulkhead was constructed in accordance with the specifications supplied to us by the owners, which they will produce.

Mr. Kirlin reads the deposition of HENRY WOOLARD, taken on behalf of the claimant, under a commission:

FIRST INTERROGATORY.—What is your name, age,
185 residence and occupation? What, if any, part did you take in the building of the steamship *Carib Prince;* what were your duties in regard to it, and what experience have you had in the examination of and building steamships and in riveting work? A. My name is Henry Woolard. I am twenty-nine years of age, and reside at Pallion, near Sunderland. I am foreman riveter at Short Brothers, and my duties with regard to the *Carib Prince* were to superintend. I have had eighteen years' experience in the examination and building of steamships and in riveting work.

SECOND INTERROGATORY.—What was the character of the workmen who put the rivets in the bulk-
186 head between No. 1 hold and the peak tank, and what was the quality of their work in this instance? A. The workmen employed to put the rivets into the bulkhead between No. 1 hold and the peak tank were first-class, competent men. They were well qualified workmen for this work, many of them having had thirty years' experience in riveting and holding up, independent of their servitude as boys in the shipyard. They do nothing but this class of work; water-tight work. We always employ the same set of men for water-tight work. It is important in this work that we should get the best

skill we can. I overhauled the work in this instance when it was completed, and it was a splendid job. 187

THIRD INTERROGATORY.—Describe particularly any examinations or tests made to your knowledge of the said work, the rivets, bulkhead or tank, stating what part you personally took, what the condition of the parts examined or tested appeared to be, what methods were used in making the examinations or tests, and how, if at all, did such methods differ from those usually employed in the examination or testing of steamships. What was the condition of the bulkhead when completed? A. I overhauled every rivet and tested it properly and sounded it properly with my testing hammer. After that, she was filled with water twice abreast the fore peak tank. Independent of that, I may state that Lloyds' surveyor and myself overhauled her, our two selves, between the putting in of the two waters. They filled her once for the shell, then Mr. Sharpe and I overhauled her, and then they filled her again for the owners' survey. When she was finished, I found her to be a splendidly finished job. The methods used in examination and testing were partly with a knife and partly with this hammer (hammer shown). After that the water. Those methods do not differ at all from those usually employed in the examination and testing of steamships. 188

FOURTH INTERROGATORY.—If you know of any other matter or thing to the advantage of the claimant in this action, state the same as fully as if you had been specifically asked about it? A. All I can say is that she was a splendid job, and she was accepted by Lloyds and also by the owners' surveyors. The compartment I tested was water-tight in every way. 189

Mr. Black reads cross-interrogatories and answers thereto, as follows:

FIRST CROSS-INTERROGATORY.—What number of rivets were there in the fore bulkhead forming the

190 after end of the fore tank? How many rows of rivets were there to each lap? How far apart horizontally were the rivets? How far apart were the rows vertically and horizontally? A. There were between 1,300 and 1,400 rivets in the fore bulkhead forming the after end of the fore tank. There was one row of rivets to each lap. The rivets were 3¼ inches apart from centre to centre, according to Lloyds' Rules. The rows were 3¼ inches apart in the seams, and 5¼ in the stiffening bars. The first tier from the tank top was doubled.

SECOND CROSS-INTERROGATORY.—Describe the location of each rivet, and state through what it passed and how many of all said rivets you saw
191 driven or drove yourself? A. I cannot state the location of each rivet. The rivets were in the ordinary places, according to Lloyds' Rules—all in their proper places when I examined them at the finish. I did not drive in any of the rivets myself. I superintended the work, and they were properly driven. I was constantly superintending. I was there throughout the working day. I gave my eight hours to that particular ship, and was going about the ship superintending at different parts constantly.

THIRD CROSS-INTERROGATORY.—Where were you when each of those particular rivets were driven or headed; if you say you were not all the time there present, state what portion of the time you were
192 not present there at that bulkhead and how many of said rivets of said bulkhead you did not see driven, or what proportion? A. I cannot say where I was when each of these particular rivets was driven or headed. I was constantly going backwards and forwards superintending all the work. I was superintending the work of the ship generally. I saw a large proportion of the rivets driven. My entire working day was given to the construction of that particular ship. I was superintending her throughout the working days, visiting different parts.

FOURTH CROSS-INTERROGATORY.—Did you use a drift pin or drift iron in constructing that fore tank?

A. I used the drift pin or drift iron in constructing 193
that fore tank when necessary. It is used for clean-
ing the holes out.

FIFTH CROSS-INTERROGATORY.—Did you see a drift pin or drift iron used in constructing that fore tank? A. I saw the drift pin used in constructing that fore tank.

SIXTH CROSS-INTERROGATORY.—Did any one use a drift pin or drift iron in constructing that fore tank? A. The drift pin was used in constructing that fore tank.

SEVENTH CROSS-INTERROGATORY.—How many times was the drift used in constructing that fore tank? A. I cannot say how many times the drift was used in constructing that fore tank. It was used when 194
necessary. It is put through to clean the hole when necessary. It is put in oily waste and put through to see that the thing is perfectly clear.

EIGHTH CROSS-INTERROGATORY.— What occasion was there for using the drift in such construction? A. The occasion for using the drift pin in such construction was to clean the hole out properly, so that the rivets drove properly up.

NINTH CROSS-INTERROGATORY.—Where were you when the drift was used in such construction? A. When the drift was used in such construction, I was about from time to time looking about the work and acting as superintendent generally.

TENTH CROSS-INTERROGATORY.—Were the rivets headed up cold or hot, or some cold and some hot? 195
A. The rivets were all headed up hot. It is impossible for riveters to knock a rivet down cold. With a rivet of this size, three-fourths inch, it was impossible. In water-tight work it is never done cold. If it is beaten down cold it is apt to crystalize. It is done with small rivets, half inch, for ventilators, and so on. But with a rivet of that size it would be practically impracticable to knock it down cold. Rivets of that size are never riveted cold.

ELEVENTH CROSS-INTERROGATORY.—Did you see all the rivets inserted in the rivet holes in that fore

196 tank? If nay, how many were inserted that you did not see? A. I did not see all the rivets inserted in the rivet holes in that fore tank. As I said before, I was going about constantly superintending the whole work. I saw them afterwards, and tested them when the bulkhead was completed. I overhauled every rivet with a testing hammer, and the owners' and Lloyds' surveyor tested them after me.

TWELFTH CROSS-INTERROGATORY.—How do you know that all the rivets were hot? A. I know that all the rivets were hot, because they could not knock them down cold. I saw them heated. The riveters are paid by time; they do not do these jobs by piece at all.

197 THIRTEENTH CROSS-INTERROGATORY.—Will hammering on a cold rivet make the iron cold short? A. If a rivet is not properly heated, if it is inclined to what we call "black hot," it will turn crystalized if hammered too much, and snap. I detect that again when I am testing, and if any have been crystalized, we take them out. A hot rivet will not turn that way. In this particular bulkhead I did not find one of that description.

FOURTEENTH CROSS-INTERROGATORY. — Will a buckled plate cause any strain on a rivet greater than one that is not buckled? A. I cannot say whether a buckled plate will cause any strain on a rivet greater than one that is not buckled; that is
198 not in my line of work.

FIFTEENTH CROSS-INTERROGATORY.—What is the method you employed for bringing rivet holes which were not fair into line? A. The method employed for bringing rivet holes into line that are not fair is by riming.

SIXTEENTH CROSS-INTERROGATORY.—How many rivet holes did you see faired in the fore tank construction? A. I cannot say how many rivet holes I saw faired in the fore tank construction. Those that required to be rimed would be rimed, but I cannot exactly say the number. They could not get

the rivets in if the rivet holes were not fair, without riming. 199

SEVENTEENTH CROSS-INTERROGATORY.—Will you swear of your own personal knowledge that no rivet holes were faired in the fore tank bulkhead, braces, beams or angle irons, or either of them? A. I will not swear that no rivet holes were faired in the fore tank bulkhead, braces, beams, or angle irons, or either of them. I know that they did fair, but I cannot say how many. The holes that were not properly in line had to be faired. I found when the bulkhead was complete there were very few rimed holes. If a hole is rimed we put a bigger sized rivet into it. Instead of a three-quarter inch rivet, we put a seven-eighths rivet into it. We rime the two 200 holes to one size and put a corresponding rivet in to fill it, so it is as tight as possible, with this difference, that it is a stronger rivet. Where the holes were faired they were properly faired.

EIGHTEENTH CROSS-INTERROGATORY.—What watch did you give to the riveting of the fore tank to prevent the rivets becoming cold short? A. I gave a general, usual and careful supervision to the riveting of the fore tank. I was there as often as I could possibly get.

NINETEENTH CROSS-INTERROGATORY. (*Nil.*)

TWENTIETH CROSS-INTERROGATORY.—Q. If you saw that a rivet was being hammered too much, what did you do? A. I never saw a heated rivet 201 hammered too much. The thing is to get them to hammer it sufficiently. We have to watch them to see that they hammer it properly.

TWENTY-FIRST CROSS-INTERROGATORY.—How many times have you been asked about the rivets used on the *Carib Prince* before you testified, and by whom? Have you ever written anything about the said rivets; if yea, to whom and when? Produce a copy of what you wrote and say if you have done so and hand it to the Commissioner to be annexed to your deposition, and say if you have done so? A. Before I testified, I have been asked

202 about the rivets used in the *Carib Prince* by those representing the *Carib Prince*. I have never written anything about the said rivets.

TWENTY-SECOND CROSS-INTERROGATORY.—Whose employment are you in? Whose employment were you in while the *Carib Prince* was being built? What responsibility for bad workmanship, or bad material in the *Carib Prince*, exists in you, or your employer, or those you were employed by? If by written contract, annex a copy thereof and say if you have done so? A. I am in the employment of Short Brothers, shipbuilders, Pallion, on the Wear, near Sunderland, and was in their employment at the time the *Carib Prince* was built. My responsi-
203 bility for bad workmanship or bad material was that I had to do my duty and act properly as foreman. I was employed as superintendent, to see that the work was well done. I do not know what the responsibility upon my employer was. I know of no written contract or agreement; I was merely employed as superintendent.

Mr. Kirlin reads the deposition of ANDREW TROTTER LYNN, taken on behalf of the claimant, under a commission.

FIRST INTERROGATORY.—What is your name, age, residence and occupation? What, if any, part did you take in the building of the steamship *Carib Prince;* what were your duties in regard to it, and
204 what experience have you had in the examination of and building steamships and in riveting work? A. My name is Andrew Trotter Lynn. I am 50 years of age, and reside at Heaton, Newcastle-on-Tyne. I am a ship surveyor. I was inspecting surveyor of the *Carib Prince* during the construction of the vessel, with Mr. James. I have had 30 years' experience as a practical workman in building steamships and in riveting work. The last ten years of the thirty have been wholly in inspecting.

SECOND INTERROGATORY.—What was the character of the workmen who put the rivets in the bulkhead

between No. 1 hold and the peak tank, and what was the quality of their work in this instance? A. The workmen who pu. the rivets into the bulkhead between No. 1 hold and the peak tank were experienced workmen and men of good character. Their work in this instance was very good. 205

THIRD INTERROGATORY.—Describe particularly any examinations or tests made, to your knowledge, of the said work, rivets, bulkhead or tank, stating what part you personally took; what the condition of the parts examined or tested appeared to be; what methods were used in making the examinations or tests, and how, if at all, did such methods differ from those usually employed in the examination or testing of steamships. What was the condition of the bulkhead when completed? A. After the builders' foreman had passed the rivets, and told me he had passed them, I tested them in the usual manner with a hammer. I tested in this particular bulkhead each rivet with a testing hammer. I had a steel with me at the same time; it is like a knife, to see if you could get under the head or between the plates—the plies. Previous to the ship being launched they filled the tank up to within 15 inches of the top of the tank, to test the bulkhead and the shell; that is, the outer skin of the ship. At that time, the ship was lying five eighths to the foot, which meant considerable more pressure on the bottom of the bulkhead than there would be if the ship was lying on an even keel or perhaps a foot by the stern. The result of the test was good. Scarcely a weep of one of the rivets was to be seen. A weep is a dampness that comes, but no more; in this case it was very, very trifling on the low part. The next test Mr. James made after she was launched; I was not there. Those are the methods regularly employed in the examination and testing of steamships. The condition of the bulkhead, when completed, was good. 206 207

FOURTH INTERROGATORY.—If you know of any other matter or thing to the advantage of the claim-

208 ant in this action, state the same as fully as if you had been specifically asked about it? A. As a practical man I say she was a good job, and particularly this water-tight work, which was done well, by experienced men. The work done on this bulkhead was a good job; it being a collision bulkhead, it was my thought to pay special attention to it. I did; and made a good job of it. It was a thoroughly good job.

Mr. Black reads cross-interrrogatories and answers thereto as follows:

FIRST CROSS-INTERROGATORY.—What number of rivets were there in the fore bulkhead forming the
209 after end of the fore tank? How many rows of rivets were there to each lap? How far apart horizontally were the rivets? How far apart were the rows vertically and horizontally? A. The rivets were spaced according to Lloyds' rules. It is necessary to conform to Lloyds' rules to get class, and, therefore, everything was according to Lloyds' rules.

SECOND CROSS-INTERROGATORY.—Describe the location of each rivet, and state through what it passed, and how many of all the said rivets you saw driven or drove yourself? A. It is impossible to give the location of each rivet. The riveting was done as usual, and properly.

210 THIRD CROSS-INTERROGATORY.—Where were you when each of those particular rivets was driven or headed; if you say you were not all the time present, state what portion of the time you were not present there at that bulkhead, and how many of said rivets of said bulkhead you did not see driven, or what proportion? A. I acted generally as inspecting surveyor of the whole building of the *Carib Prince*, and was there for about three hours a day, and so saw many of the rivets driven, but I cannot say how many.

FOURTH CROSS-INTERROGATORY.—Did you use a drift pin or drift iron in constructing that fore tank?

A. A drift pin was used by the builders in the usual way they do. 211

FIFTH CROSS-INTERROGATORY.—Did you see a drift pin or drift iron used in constructing that fore tank? A. I saw the drift pin used in the construction of the fore tank.

SIXTH CROSS-INTERROGATORY.—Did any one use a drift pin or drift iron in constructing that fore tank? A. A drift pin was used in the construction of the fore tank.

SEVENTH CROSS-INTERROGATORY. — How many times was the drift used in constructing that fore tank? A. I cannot say how many times the drift pin was used in constructing that fore tank.

EIGHTH CROSS-INTERROGATORY.—What occasion was there for using the drift in such construction? A. The occasion for using the drift pin in such construction was to smooth a hole. 212

NINTH CROSS-INTERROGATORY.—Where were you when the drift was used in such construction? A. I could not say where I was when the drift pin was used in such construction. I would be about the ship at the time.

TENTH CROSS-INTERROGATORY.—Were the rivets headed up cold or hot, or some cold and some hot? A. The rivets were all headed up hot.

ELEVENTH CROSS-INTERROGATORY.—Did you see all the rivets inserted in the rivet holes in that fore tank? If nay, how many were inserted that you did not see? A. I saw some of the rivets inserted in the rivet holes in the fore tank, but I could not say how many. I supervised the work generally. 213

TWELFTH CROSS-INTERROGATORY.—How do you know that all the rivets were hot? A. I know the rivets were all hot, because they could not put a rivet of that size in cold.

THIRTEENTH CROSS-INTERROGATORY.—Will hammering on a cold rivet make the iron cold short? A. "Cold short" is not a term used in regard to rivets. Hammering on a cold rivet will certainly make it

214 brittle. It would need excessive hammering on a cold rivet to set up crystallization.

FOURTEENTH CROSS-INTERROGATORY. — Will a buckled plate cause any strain on a rivet greater than one that is not buckled? A. A buckled plate will not cause any strain on a rivet greater than one that is not buckled, provided the faying of the hole is not between the plates. The "faying" is the "bore" of the hole, the ridge made by the punch round the edge of the hole. There is no extra strain, provided the plates are flat at the place where they come together.

FIFTEENTH CROSS-INTERROGATORY.—What is the method you employed for bringing rivet holes which
215 were not fair into line? A. The method employed for bringing rivet holes which are not fair into line is by riming.

SIXTEENTH CROSS-INTERROGATORY.—How many rivet holes did you see faired in the fore tank construction? A. I cannot say how many rivet holes I saw faired in the fore tank construction. They were faired if necessary.

SEVENTEENTH CROSS INTERROGATORY.—Will you swear of your own personal knowledge that no rivet holes were faired in the fore tank bulkhead, braces, beams or angle irons, or either of them? A. I will not swear of my own personal knowledge that no rivet holes were faired in the fore tank bulkhead,
216 braces, beams, angle irons, or either of them.

EIGHTEENTH CROSS-INTERROGATORY.—What watch did you give to the riveting of the fore tank to prevent the rivets becoming cold short? A. I gave to the riveting of the fore tank a general watch. I did not anticipate cold short.

NINETEENTH CROSS-INTERROGATORY.—(*Nil*).

TWENTIETH CROSS-INTERROGATORY.—If you saw that a rivet was being hammered too much, what did you do? A. I never saw a rivet hammered too much.

TWENTY-FIRST CROSS-INTERROGATORY.—How many times have you been asked about the rivets

used on the *Carib Prince* before you testified, and by whom? Have you ever written anything about the said rivets; if yea, to whom and when? Produce a copy of what you wrote and say if you have done so, and hand it to the Commissioner to be annexed to your deposition, and say if you have done so? A. I have been asked twice by the English representatives of the *Carib Prince* about the rivets used in the *Carib Prince*. I have never written anything about the said rivets. 217

TWENTY-SECOND CROSS-INTERROGATORY.—Whose employment are you in? Whose employment were you in while the *Carib Prince* was being built? What responsibility for bad workmanship or bad material in the *Carib Prince* exists in you or your employer, or those you were employed by? If by written contract, annex a copy thereof and say if you have done so. A. I am now, and was at the time the *Carib Prince* was built, in the employment of Mr. James Knott, of Newcastle-upon-Tyne, managing owner of the *Carib Prince*. My responsibility was to superintend the work generally for the owner. And my interest was to see that the work was well done, and that it was right when it was done. I am still in Mr. Knott's employment, with the right to take other jobs as ship's surveyor. My responsibility would simply be as a ship's surveyor. 218

219

Mr. Kirlin reads the deposition of WILLIAM LLOYD SHARPE, taken in behalf of the claimants, under a commission.

FIRST INTERROGATORY.—What is your name, age, residence and occupation? What, if any, part did you take in the building of the steamship *Carib Prince*, what were your duties in regard to it, and what experience have you had in the examination and building steamships and in riveting work? A. My name is William Lloyd Sharpe; I live at Sunderland; I am forty-nine years of age and am a Lloyds'

220 surveyor. I took supervision of the whole building of the *Carib Prince*, except the machinery, for Lloyds. I have had thirty years' experience in the examination of and building of steamships and in riveting work, part of the time as a practical riveter.

SECOND INTERROGATORY.—What was the character of the workmen who put the rivets in the bulkhead between No. 1 hold and the peak tank, and what was the quality of their work in this instance? A. The workmen who put the rivets in the bulkhead between No. 1 hold and the peak tank were very good riveters, and the work generally throughout the ship was very good. As one of Lloyds' surveyors at Sunderland I have known the particular
221 set of men who did that work as experienced riveters for several years.

THIRD INTERROGATORY.—Describe particularly any examinations or tests made to your knowledge of the said work, rivets, bulkhead or tank, stating what part you personally took, what the condition of the parts examined or tested appeared to be. What methods were used in making the examinations or tests, and how, if at all, did such methods differ from those usually employed in the examination or testing of steamships. What was the condition of the bulkhead when completed? A. I personally tested almost every rivet in the fore peak, with the usual test of the hammer. The peak was
222 then filled with water and tested to the requirements of Lloyds' rules, and found very satisfactory. After the peak was emptied I was again inside the peak tank and did more testing, and found everything very good and satisfactory. There were two water tests and I was present at both. Those were the usual tests. The condition of the bulkhead when completed was very good.

FOURTH INTERROGATORY.—If you know of any other matter or thing to the advantage of the claimant in this action, state the same as fully as if you had been specifically asked about it? A. I surveyed for class, and the job was a good one when it was

done. Certainly the bulkhead when completed was 223
in excellent condition, with good workmanship. Right through the ship generally was very good. I can only account for any damage having arisen to the fore peak by the peak having received some unnecessary strain or concussion of some sort.

Mr. Black reads cross-interrogatories and answers thereto, as follows:

FIRST CROSS INTERROGATORY.—What number of rivets were there in the fore bulkhead forming the after end of the fore tank? How many rows of rivets were there to each lap? How far apart horizontally were the rivets? How far apart were the 224
rows vertically and horizontally? A. The rivets in the fore bulkhead forming the after end of the fore tank were spaced according to Lloyds' rules. The laps were single riveted, and the riveting was according to Lloyds' requirements for water-tight bulkheads.

SECOND CROSS-INTERROGATORY.—Describe the location of each rivet, and state through what it passed, and how many of all said rivets you saw driven, or drove yourself? A. I cannot describe the location of each rivet. I cannot say how many I saw driven. It is not necessary for me to be there to see them driven; I come in at the finish and see that they are all right when driven. I was there almost every day, so I would see very nearly the whole of it. 225

THIRD CROSS-INTERROGATORY.—Where were you when each of those particular rivets was driven or headed; if you say you were not all the time there present, state what portion of the time you were not present there at that bulkhead, and how many of said rivets of said bulkhead you did not see driven, or what proportion? A. As I said in answer to the last question, I was there nearly every day superintending the work. I cannot say what proportion of such rivets in such bulkhead I saw driven.

226 I went after it was done and tested, and all the rivets were found right.

FOURTH CROSS-INTERROGATORY.—Did you use a drift pin or drift iron in constructing that fore tank? A. I did not myself use a drift pin or iron in the construction of that fore tank.

FIFTH CROSS-INTERROGATORY.—Did you see a drift pin or drift iron used in constructing that fore tank? A. I saw a drift pin used in the construction of that fore tank, as usual.

SIXTH CROSS-INTERROGATORY.—Did any one use a drift pin or drift iron in constructing that fore tank? A. A drift pin was used in the construction of that fore tank.

227 SEVENTH CROSS-INTERROGATORY.—How many times was the drift used in constructing that fore tank? A. It is impossible to say how many times the drift pin was used in the construction of that fore tank. It was not used unnecessarily, that I noticed.

EIGHTH CROSS-INTERROGATORY.—What occasion was there for using the drift in such construction? A. The occasion for using the drift pin in such construction was to smooth holes, to get the rivets straight through. It is always used under such circumstances.

NINTH CROSS-INTERROGATORY.—Where were you when the drift was used in such construction? A. I
228 was about the vessel when the drift pin was used in such construction.

TENTH CROSS-INTERROGATORY.—Were the rivets headed up cold or hot, or some cold and some hot? A. The rivets were all headed up hot. It is impossible to knock them down cold.

ELEVENTH CROSS-INTERROGATORY.—Did you see all the rivets inserted in the rivet holes in that fore tank? If nay, how many were inserted that you did not see. A. It is impossible for me to say how many rivets I saw inserted in the rivet holes in that fore tank. But I gave a general supervision as Lloyds' surveyor.

TWELFTH CROSS-INTERROGATORY.—How do you know that all the rivets were hot? A. I know that all the rivets were hot, because it was impossible to knock them down cold, rivets of that size. There are machines for riveting, but they are all hot rivets. 229

THIRTEENTH CROSS-INTERROGATORY.—Will hammering on a cold rivet make the iron cold short? A. There is no such term as "cold short" in riveting or in rivet iron at all. "Cold short" is used for the manufacture of iron. It is a very old term, which indicates a breaking; it does away with the grain of the iron. Heading a cold rivet would crystallize it, but would not make it cold short.

FOURTEENTH CROSS-INTERROGATORY.—Will a buckled plate cause any strain on a rivet greater than one that is not buckled? A. A buckled plate will not cause any strain on a rivet greater than one that is not buckled, provided there is sufficient faying surface at each side of the rivet; a buckled plate will have no effect upon the rivet. 230

FIFTEENTH CROSS-INTERROGATORY.—What is the method you employed for bringing rivet holes which were not fair, into line? A. The method employed for bringing rivet holes which were not fair into line is by riming.

SIXTEENTH CROSS INTERROGATORY.—How many rivet holes did you see faired in the fore tank construction? A. I cannot say how many holes I saw faired in the fore tank construction. 231

SEVENTEENTH CROSS-INTERROGATORY.—Will you swear of your own personal knowledge that no rivet holes were faired in the fore tank bulkhead, braces, beams or angle irons, or either of them? A. I will not swear of my own personal knowledge that no rivet holes were faired in the fore tank bulkhead, braces, beams or angle irons, or either of them. It is very necessary to fair them sometimes. All holes that were faired were faired in a proper, workmanlike manner.

EIGHTEENTH CROSS-INTERROGATORY.—What

232 watch did you give to the riveting of the fore tank to prevent the rivets becoming cold short? A. I gave to the riveting of the fore tank the usual supervision of a Lloyds' surveyor. I visited the works almost daily. I did not anticipate "cold short," which does not apply to riveting.

NINETEENTH CROSS-INTERROGATORY.—(*Nil*).

TWENTIETH CROSS-INTERROGATORY.—If you saw that a rivet was being hammered too much what did you do? A. It is impossible for a hot rivet to be hammered too much.

TWENTY-FIRST CROSS-INTERROGATORY.—How many times have you been asked about the rivets used on the *Carib Prince* before you testified, and by whom?
233 Have you ever written anything about the said rivets? If yea, to whom and when? Produce a copy of what you wrote and say if you have done so and hand it to the Commissioner to be annexed to your deposition and say if you have done so? A. I have been asked twice before I testified about the rivets used in the *Carib Prince* by the English representatives of the *Carib Prince*. I have not written anything about the said rivets.

TWENTY-SECOND CROSS-INTERROGATORY.—Whose employment are you in? Whose employment were you in while the *Carib Prince* was being built? What responsibility for bad workmanship or bad material in the *Carib Prince* exists in you or your
234 employer, or those you are employed by? If by written contract, annex a copy thereof and say if you have done so? A. I am now, and was at the time the *Carib Prince* was being built, in the employment of Lloyds' Registry. For bad workmanship or bad material I had the responsibility of a Lloyds' surveyor, my reputation being at stake.

Mr. Kirlin reads the deposition of MATTHEW COULSON JAMES, taken on behalf of the claimant under a commission. 235

FIRST INTERROGATORY.—What is your name, age, residence and occupation? What, if any, part did you take in the building of the steamship *Carib Prince*, what were your duties in regard to it, and what experience have you had in the examination of and building steamships and in riveting work? A. My name is Matthew Coulson James. I am 37 years of age, and reside at Gateshead. I am a shipbuilder and naval architect. The ship *Carib Prince* was built to my design, and I was inspector on behalf of the owner to see that those designs and specifications were carried out. I have had 24 years' 236 experience as a shipbuilder, in all branches of shipbuilding.

SECOND INTERROGATORY.—What was the character of the workmen who put the rivets in the bulkhead between No. 1 hold and the peak tank, and what was the quality of their work in this instance? A. The workmen who put the rivets in the bulkhead between No. 1 hold and the peak tank appeared to be competent men, and the work they did was very good and sound.

THIRD INTERROGATORY.—Describe particularly any examinations or tests made to your knowledge of the said work, rivets, bulkhead or tank, stating what part you personally took, what the condition 237 of the parts examined or tested appeared to be, what methods were used in making the examinations or tests, and how, if at all, did such methods differ from those usually employed in the examination or testing of steamships. What was the condition of the bulkhead when completed? A. I was present when the tank and bulkhead were tested, by filling the tank with water to about a foot above the main deck. I calculated the pressure thus exerted and found it to be ninety-six and three-quarter tons total pressure on the bulkhead. That is in excess of

238 Lloyds' requirements. The bulkhead was thoroughly tight, and stood the test satisfactorily, without showing any signs of weakness or leaking. I did not see the first test. I did not particularly test all the rivets, but I did test a few with a hammer, and found them tight and properly laid up. The tests were the usual tests used for such parts of a vessel. The bulkhead, when completed, was a thoroughly good job.

FOURTH INTERROGATORY.—If you know of any other matter or thing to the advantage of the claimant in this action, state the same as fully as if you had been specifically asked about it. A. More than usual care was taken in the supervision of the work
239 on this ship. I visited her twice or three times a week, and my colleague, Mr. Lynn, visited her even more frequently, and we gave very close attention to the work. Our survey was in addition to the usual survey of Lloyds' surveyor.

Mr. Black reads cross-interrogatories and answers thereto as follows:

FIRST CROSS-INTERROGATORY.—What number of rivets were there in the fore bulkhead forming the after end of the fore tank? How many rows of rivets were there to each lap? How far apart horizontally were the rivets? How far apart were the
240 rows vertically and horizontally? A. I cannot state the number of rivets there were in the fore bulkhead forming the after end of the fore tank. I am not a rivet counter, and only a rivet counter knows that. The spacing of the rivets, the arrangement of the plates, stiffening angles, and the general design of the bulkhead, were strictly in accordance with Lloyds' rules. Additional stiffening was fitted in accordance with my specification, in order to make the bulkhead more than usually strong. Lloyds require certain things, and the owners, to get a particularly good job, required extra stiffening

right through the ship; we have things in excess of 241
Lloyds' requirements.

SECOND CROSS-INTERROGATORY.—Describe the location of each rivet, and state through what it passed and how many of all said rivets you saw driven or drove yourself? A. I cannot describe the location of each rivet. I gave a general supervision to the construction of the bulkhead, but cannot speak as to the number of rivets or their location. The work was satisfactorily carried out.

THIRD CROSS-INTERROGATORY.—Where were you when each of those particular rivets was driven or headed; if you say you were not all the time there present, state what portion of the time you were not present there at that bulkhead, and how many of 242
said rivets of said bulkhead you did not see driven or what proportion? A. I visited the ship two or three times every week during the construction, and, as I said before, the work was done satisfactorily.

FOURTH CROSS-INTERROGATORY.—Did you use a drift pin or drift iron in constructing that fore tank? A. The drift pin would certainly be used, as is the usual custom in ordinary shipbuilding work.

FIFTH CROSS-INTERROGATORY.—Did you see a drift pin or drift iron used in constructing that fore tank? A. I do not remember that I saw the drift pin used in constructing that fore tank.

SIXTH CROSS-INTERROGATORY.—Did any one use a 243
drift pin or drift iron in constructing that fore tank? A. I cannot say that any one did use the drift pin in constructing the fore tank, but I suppose it would be used when necessary.

SEVENTH CROSS-INTERROGATORY.—How many times was the drift used in constructing that fore tank? A. I have no idea how many times the drift pin was used in constructing that fore tank.

EIGHTH CROSS-INTERROGATORY.—What occasion was there for using the drift in such construction? A. The occasion for using the drift pin in such con-

244 struction was to smooth the hole, to facilitate the passage of the rivet through.

NINTH CROSS-INTERROGATORY.—Where were you when the drift was used in such construction? A. I cannot say where I was when the drift pin was used in such construction.

TENTH CROSS-INTERROGATORY.—Were the rivets headed up cold or hot, or some cold and some hot? A. The rivets would certainly be headed up hot; they could not be headed up cold.

ELEVENTH CROSS-INTERROGATORY.—Did you see all the rivets inserted in the rivet holes in that fore tank? If nay, how many were inserted that you did not see? A. I cannot say how many rivets I saw in-
245 serted in the rivet holes in the fore tank. It is not customary for inspectors to count the rivets

TWELFTH CROSS-INTERROGATORY.—How do you know that all the rivets were hot? A. I know the rivets were hot, because they could not be laid up cold.

THIRTEENTH CROSS INTERROGATORY.—Will hammering on a cold rivet make the iron cold short? A. Long continuous hammering will render a rivet brittle. The term "cold short" is never applied to rivets. It is an obsolete term, formerly used in iron manufacture.

FOURTEENTH CROSS-INTERROGATORY.—Will a buckled plate cause any strain on a rivet greater
246 than one that is not buckled? A. A buckled plate will not cause any strain on a rivet greater than one that is not buckled if the faying surfaces are close together in the way of the riveting.

FIFTEENTH CROSS-INTERROGATORY.—What is the method you employed for bringing rivet holes which were not fair into line? A. The method employed to bring rivet holes which are not fair into line is by riming.

SIXTEENTH CROSS-INTERROGATORY.—How many rivet holes did you see faired in the fore tank construction? A. I saw no rivet holes faired in the fore tank construction.

SEVENTEENTH CROSS-INTERROGATORY.—Will you swear of your own personal knowledge that no rivet holes were faired in the fore tank bulkhead, braces, beams or angle irons, or either of them? A. I will not swear of my own personal knowledge that no rivet holes were faired in the fore tank bulkhead, braces, beams, angle irons, or either of them. In the building of almost any part of an iron ship there are more or less holes to be faired. 247

EIGHTEENTH CROSS-INTERROGATORY.—What watch did you give to the riveting of the fore tank to prevent the rivets becoming cold short? A. I gave a general supervision to the riveting of the fore tank. Mr. Lynn, my colleague, had the practical supervision and mine was general. I did not anticipate cold short rivets. 248

NINETEENTH CROSS-INTERROGATORY.—(*Nil*).

TWENTIETH CROSS INTERROGATORY.—If you saw that a rivet was being hammered too much, what did you do? A. I have never found a rivet hammered too much.

TWENTY-FIRST CROSS-INTERROGATORY.—How many times have you been asked about the rivets used on the *Carib Prince* before you testified, and by whom? Have you ever written anything about the said rivets? If yea, to whom and when? Produce a copy of what you wrote and say if you have done so, and hand it to the Commissioner to be annexed to your deposition and say if you have done so? A. Before I testified I have been seen by the Newcastle solicitor for the *Carib Prince* once with reference to the rivets. I have never written anything about the said rivets. 249

TWENTY-SECOND CROSS-INTERROGATORY.—Whose employment are you in? Whose employment were you in while the *Carib Prince* was being built? What responsibility for bad workmanship or bad material in the *Carib Prince* exists in you, or your employer, or those you were employed by? If by written contract, annex a copy thereof and say if you have done so? A. I am now, and was at the

250 time of the building of the *Carib Prince*, in the employment of Mr. James Knott, of Newcastle-on-Tyne, the managing owner of the *Carib Prince*. I was responsible to him and to the owners to see that the vessel was well and truly built in accordance with my designs and specification. I produce the specification from which the *Carib Prince* was built, and I hand in extracts from pages 1 to 6 of the material portions relating to the particular work in question, and marked "Exhibit A."

HERBERT VERNON SAUNDERS, being duly sworn and examined as a witness for the claimants, testifies:

251 By Mr. Kirlin:

Q. Are you a master mariner? A. I am.

Q. Have you had command of iron and steel steamships? A. I have.

Q. For how long? A. A period of over two years.

Q. What is your present business? A. Superintendent.

Q. For whom? A. Mr. James Knott.

Q. The owner of the *Carib Prince?* A. Managing owner of the *Carib Prince.*

Q. How long have you been superintendent in New York? A. Over twelve months.

252 Q. What are your duties as superintendent? A. Generally look after the steamers' repairs, engines and boilers, and so forth.

Q. How many steamers do you look after for Mr. Knott? A. On the whole, about fifty steamers.

Q. Where were you in New York at the end of the voyage in September, 1893? A. I was not in New York when she returned on that voyage.

Q. When were you next after that? A. I was here when she returned two voyages after that, in the beginning of January.

Q. Had the bulkhead been repaired in the meantime? A. The bulkhead was not finally repaired

until I returned; that was the beginning of January. 253

Q. Before that how had the hole been stopped? A. Part of the rivet had been caulked up and a temporary bolt put in where the one was gone.

Q. Did you see the bolt taken out? A. I saw the bolt taken out.

Q. What was the condition of the hole? A. Practically fair, but rusty.

Q. The engineer testified that the holes were not fair at that point, the holes where that rivet was broken out; is that testimony true?

Objected to.

A. The holes that I saw were practically fair; in other words, true. 254

Q. What size were they? A. Three-quarters.

Q. Had they been reamed out at that time? A. They had not.

Q. Were you aboard when the rivets were taken out? A. I was aboard when the rivets were knocked out.

Q. How many were taken out? A. Of those that were slack, we renewed five.

Q. Did you see the holes after those rivets were taken out, all of them? A. All of them after they were taken out.

Q. How were the holes? A. The holes were true.

Q. The holes in the knee tie and in the bulkhead? 255
A. Were practically true. They may be a shade out more or less.

Q. What is a "shade"? A. Say, might be a sixteenth of an inch.

Q. Does that make any difference in the strength of a rivet? A. It does not.

Q. Did you see the new rivets put in? A. I saw them after they were put in.

Q. Were you there when they were tested afterwards? A. I tested them myself.

256 Q. Are the officers and engineer of the ship servants of Mr. Knott? A. They are not.

Q. The vessel is under charter? A. The vessel is under time charter.

Q. A charter of the bare ship?

Counsel for libellants moves to strike out that the officers of the ship are not in the service of Mr. Knott as mere hearsay.

Q. Have you got the charter-party of the *Carib Prince?* A. I have in my office.

Q. Do you know whether it is the charter of the bare ship or not?

Objected to on the ground that the charter-
257 party speaks for itself.

A. The ship is on time charter.

Q. Is this a copy of the charter-party I show you? A. It is.

Mr. Kirlin: I offer in evidence the charter-party for the purpose of showing that it is only a charter of the bare ship and that all of the members of the crew and officers are servants of the charterer, not of the shipowner.

The charter-party is marked Claimants' Exhibit A.

Q. Does the hire of the vessel pass through your hands? A. It does not.

258 Q. Whose hands? A. W. W. Hurlbut & Co., and they collect the hire monthly.

Q. Have you ever commanded a ship that had a peak-tank? A. I have.

Q. Can you say whether or not it is a prudent thing to do to fill the peak tank at sea without stopping the ship? A. It is not. The proper thing is a ship should be stopped and perfectly still. It is a very unwise, unsafe thing to do, on account of the strain, the motion of the water causing heavy strain on the bulkhead.

Q. Do you know what the capacity of that tank is? A. Eighty-three tons.

CROSS-EXAMINED by Counsel for Libellants: 259

By Mr. Black:

Q. I understand you did not see the ship until January after this thing happened? A. January.

Q. Then you found some temporary repairs in this bulkhead. Did you see those bolts removed? A. I did; I saw one bolt removed.

Q. How many bolts were there? A. There was only one.

Q. Sure of that? A. The other rivets that were replaced were leaky rivets.

Q. How many bolts did you see? A. One.

Q. That bolt ran through what part of this bulkhead? A. The end of the angle iron on the fore- 260
and-aft stringer.

Q. Which end of the angle iron? A. The inside end.

Q. On which side of the ship? A. On the port side of the ship.

Q. How far from the side of the ship was that bolt? A. About two feet.

Q. How high above the floor of No. 1 hold was that bolt? A. About four feet above the floor or top of the tank.

Q. Did you have that bolt in your hand? A. I did not.

Q. It had a head on one side and a nut on the other? A. It did.

261

Q. Which side you see? A. I saw both. I was inside of the tank and outside of the tank.

Q. Which side of the bulkhead was the nut? A. The nut was on the outside or in the hold, No. 1 hold.

Q. Were you present when that bolt was removed? A. I was not when it was removed.

Q. What was in that hole when you saw it next after the nut was there? A. The hole was clean; there was nothing in it.

Q. Nothing in it? A. Nothing in it.

262 Q. Did you see the men working at it at that time? A. I did.

Q. What were they doing to it then? A. At which particular time?

Q. When you first saw it—— A. The men were doing nothing to it. The men couldn't do anything.

Q. When you first saw it after the bolt had been taken out? A. The men were doing nothing to it.

Q. What examination did you make? A. I examined it thoroughly.

Q. Did you put your finger in the hole? A. I did.

Q. Did you go all the way through? A. Yes.

263 Q. Did you feel the angle iron at the back? A. Yes.

Q. And was it all smooth and fair there? A. Except rusty; it was fair.

Q. The hole of the angle iron and the hole of the bulkhead were exactly in line, were they not? A. As I said before it may have been a shade out, but it was practically fair.

Q. Could you run your finger through it easily? A. I could with ease.

Q. Did you measure it? A. I did not.

Q. Where were the other five rivets you renewed? A. Three on the vertical angle iron.

Q. Do you mean this stiffening bar? A. I mean

264 this stiffening bar.

Q. The one that runs vertically from the floor of the No. 1 up to the main deck? A. Up to the between-decks.

Q. And on which side of that stiffening iron were they? A. On the after part; the rivets would go through both the plate and the stiffening bar.

Q. That stiffening iron is an angle-iron, isn't it? A. Yes, sir. The vertical bar——

Q. Let me give my question. The flat part of that angle iron which comes in contact with the bulkhead was turned with the outer edge towards the side of the ship, was it? A. Correct.

Q. And these rivets which you replaced ran up 265
and down on that bar? A. Ran up and down on that bar.

Q. How far were the rivets in the stiffening bar or stiffening iron from the place where the bolt went through? A. Just alongside of it, right alongside of it.

Q. And that rivet you say you renewed as well? A. That rivet and two above it.

Q. And how many below it? A. None below.

Q. You said there were five renewed? A. Three on the vertical bar and two on the angle iron.

Q. Were those two on the same angle iron? A. Those two were on the same angle-iron.

Q. Did you know of anything being renewed on 266
the starboard side angle iron? A. I did not, with the exception one of the angle irons was caulked.

Q. Who did those repairs? A. Handren & Robins, or John N. Robins.

Q. Who made the temporary repairs? A. The temporary repairs were finished by the same foreman.

Q. That you only know by hearsay, you were not here? A. I was not here.

Q. Somebody told you so? A. Somebody told me so.

REDIRECT by Counsel for Claimants:

By Mr. Kirlin: 267

Q. Which one of the rivets was it on the knee tie or stiffening bar that was gone? A. There was none wholly gone, not on the stiffening bar; they were merely slack.

Q. I mean on the cross-tie? A. The very end rivet.

Q. Which end? A. The inside end.

Q. That is towards the amidships? A. That is towards the amidships.

Q. Where is the vertical bar, on the inside of the tank or on the outside? A. On the outside of the tank.

268 FRANK S. MARTIN, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. Kirlin:

Q. Are you a marine engineer and surveyor? A. Yes, sir.

Q. Of what experience? A. I have been a surveyor in New York for fifteen years; previous to that time I was in the ship-building business.

Q. How many times did you survey the *Carib Prince* in the fall of 1893? A. Twice.

Q. In what month? A. September.

Q. Twice in September? A. Twice in September.

Q. Did you survey her on her arrival from Gran-
269 ada? A. Yes, sir.

Q. Did you survey the peak-tank bulkhead? A. I did.

Q. Did you find any trouble with the rivets? A. I found one rivet on the port side at the inner end, that is, towards the centre of the ship, of the angle iron connecting the side stringer with the bulkhead; the head was gone; one rivet next to that was loose. That is all I found on that particular day.

Q. Was the rivet—was any part of the broken rivet in the hole when you saw it? A. No, sir; there was a plug there; a wooden plug.

By the Court:

270 Q. In the hole? A. In the hole.

Q. No part of the rivet there? A. No part of the rivet there.

By Mr. Kirlin:

Q. Did you haul the plug out and examine it? A. No, sir; I did not.

Q. When did you next examine it? A. Next day.

Q. Was the plug out of it then? A. No, the plug was still in; the tank had been filled with water.

Q. What was the condition of the bulkhead as to being water tight? A. I found the rivet that was

loose, next to the one broken, was leaking; also 271
found on the starboard side of the ship in the same angle, corresponding angle, two rivets there also leaking; and altogether I think I counted 11 rivets in the bulkhead that were leaking.

Q. Do you know what repair was made at that time? A. No, sir.

Q. Did you see the plug taken out? A. No, sir.

Q. Did you examine her when she came back and was repaired? A. I have not seen her since; I have never been aboard the vessel since.

Q. Is that a usual construction of modern steamships to have a large tank forward? A. Yes, sir.

Q. What do you say as to its being a prudent thing to fill such a tank without stopping ship? A. 272
I say it is not prudent.

Q. Why? A. The immense volume of water there is pressing against the bulkhead with the motion of the ship going through the water.

Q. Do you remember whether that tank extended to the between-decks or clear to the top deck? A. Extended to the between-decks.

Q. There has been a little confusion about that in the examination; you are positive of that, are you? A. I am positive; I went in the fore-peak tank.

CROSS-EXAMINED by Counsel for Libellants:

By Mr. Black:

273
Q. What was the date of your inspection of the *Carib Prince* in September, 1893? A. Can I look at my book?

Q. Yes. A. I have the dates here—September 11th and 12th.

Q. Who was present at the time of that examination? A. The chief engineer and the chief officer and the carpenter.

Q. Did I understand you to say that at that time there was water in this tank? A. No, sir; not until next day; I asked them to fill the tank for me.

Q. You went twice, did you? A. Yes, sir.

274 Q. Your second visit was the 12th of September? A. The 12th of September.

Q. On the first occasion you went did you make any careful examinatiou of both sides of the tank? A. No, sir.

Q. You did't go into the tank? A. I went into the tank the first day and examined around where this plug was.

Q. Did you examine in No. 1 hold the first day? A. I examined No. 1 hold first, saw where the plug was through the rivet hole, and then afterwards went in and down through the manhole into the tank and examined.

Q. Was the cargo out of No. 1 hold the first day?
275 A. They were taking the cargo out.

Q. Was it so you could see the entire face of the bulkhead? A. Yes, sir.

Q. How high above the floor do you think that plug was? A. Almost as high as my head, I should say.

Q. About five feet? A. About five feet, I should think.

Q. And how far away from the side of the vessel? A. I should say it was between three and four feet.

Q. Did you measure it? A. No, sir; I did not. It is so long ago I don't remember the exact distance, but I know it was connected with the side stringer that ran on the inside of the tank, which would be
276 about from 15 to 18 inches wide, and on the side stringer was a bracket that came out at an angle.

Q. That is a stiffening brace? A. No; this is the side stringer. Your model is correct.

Q. That is what is called a knee tie? A. A knee tie, and from that tie was an angle that ran athwartship connecting the tie with the bulkhead.

Q. That was a piece of angle-iron fastening the knee.tie to the bulkhead? A. To the bulkhead.

Q. Was there an angle iron on both sides of the knee tie? A. Top and bottom?

Q. Yes. A. I am not prepared to say; I don't remember whether there was or not.

Q. The proper construction of that bulkhead would require two angle irons at the knee tie, wouldn't it? A. Not necessarily. 277

Q. It is usual to have it so, isn't it? A. You can't tell what is usual nowadays.

Q. Hasn't it been your experience that it is usual? A. I have seen it both ways.

Q. Have you seen it most often with two angle irons? A. I can't say positive whether I have or not.

Q. You have a general impression, haven't you, which is the most common? A. I should think it would be more common with two.

Q. This particular plug ran through the bulkhead into the angle iron which fastened the bulkhead to the knee tie, didn't it? A. Ran through the bulkhead and filled up the hole. 278

Q. You haven't answered my question. It ran through the bulkhead and through the angle iron which was fast to the knee tie, didn't it? A. Yes, sir.

Q. You didn't pull that plug out? A. No, sir.

Q. You never saw it out? A. Never touched it.

Q. Didn't you see two plugs? A. I saw one.

Q. Were you looking for two plugs? A. I was looking to find any leaks.

Q. Next day you saw but the one plug again? A. But the one plug again.

Q. How many rivets did you count that were weeping or showed signs of rust where they had been weeping? A. Eleven. 279

Q. Where were those? A. Two on one side in the same position I have described and two on the other side in corresponding positions, and three or four in the vertical stiffener and several in the seam of the plate.

Q. The seam of the bulkhead? A. Yes, sir.

Q. You say two were in the "same position;" do you mean by that there was a plug and weeping rivet near that plug? A. Next rivet to it.

Q. Which ran through what? A. Through the

280 bulkhead and through the angle of the corner bracket.

Q. The next rivet nearest to the side of the ship? A. The next rivet nearest to the side of the ship.

Q. The plug was in the extreme end of the angle iron? A. The extreme end.

Q. How far apart were those two rivets horizontally? A. Probably five inches.

Mr. Kirlin reads deposition of JAMES MCPHERSON SCOTT, taken on behalf of the claimant, as follows:

Q. Captain Scott, were you the chief officer of the *Carib Prince* on the voyage from Grenada towards
281 New York in the month of September, 1893? A. Yes.

Q. How long have you been at sea? A. Since 1875.

Q. How long have you been an officer? A. Since 1879.

Q. And what certificate do you now hold? A. Master's.

Q. How long have you held a master's certificate? A. Nine years.

Q. And you are now in command of the *Carib Prince?* A. Yes.

Q. How long have you been in command? A. Three months.

Q. Do you remember the circumstance that on the
282 fifth of September, 1893, on sounding the fore-peak tank, it was discovered to have been leaking, and taking off the hatches, and making an inspection of the hold of the *Carib Prince?* A. Yes.

Q. Were you on watch at the time? A. Yes.

Q. Will you state what was the first information you received of this difficulty? A. The carpenter, after sounding the ship at 6 A. M., came and reported to me that the tank was slack or leaking. By taking off the hatches——

Q. What did you then do? A. We took off the hatches. We were taking off the hatches at the

time. We went down below into the fore lower hold. 283

Q. What did you there find? A. I there found the water was over the floor and amongst the cargo.

Q. How high up was it on the floor? A. About four feet, as near as I can recollect.

Q. On the floor? A. Three to four feet. That was on the after part of the hold, of course.

Q. The after part of the hold? What was in the forward part? A. About eight inches to a foot. I didn't take particular notice of the depth of water on the fore part.

Q. Have you any entries relating to the trim of the vessel from the last port? A. There would be the draft on there, showing she was going astern, I 284 believe, on leaving Grenada, the last port, 14.10 forward by 16.10 aft, making the ship 2 feet by the stern.

Q. How much cargo was there in the lower hold No. 1 when you went down after this report from the carpenter? A. The lower hold would be about one third full, one-third to a half full, as near as I can recollect.

Q. Did you go down personally? A. Yes.

Q. Did you ascertain the source of the leak? A. Yes.

Q. What was it? A. A rivet was out on the fore-peak tank on the port side.

Q. How far above the floor was that rivet hole? 285 A. It would be about seven feet, as near as I can remember.

Q. Who was in the hold with you at the time? A. The chief engineer.

Q. Was the leak below the top of the cargo or above it? A. Above it.

Q. Did you see it as soon as you got down? A. Yes, as soon as we got down we could see the water rushing.

Q. What precaution did you take to stop the leak? A. Started pumping the tank out—drove a plug in.

Q. Was that done? A. Yes, at once.

286 Q. What did you do next? A. Then I got the men down below, and shifted the cargo in the wings to get the limber boards up in the after end.

Q. Did you get them up? A. No; we couldn't get the back one up, but we cut through to let the water run down to the strum boxes.

By Mr. Black:

Q. That is, the strainer? A. The strainer attached.

By Mr. Kirlin:

Q. Where is that strum? A. In the bilges aft, against the bulkhead.

287 Q. Is there any sluiceway in the bulkhead between the No. 1 and No. 2 holds? A. No; each hold pumps from itself.

Q. There is a pipe from each hold, is there? A. Yes.

Q. So that water from one hold cannot get into the other? A. No.

Q. Is there any cock by which this strum pipe is opened and shut? A. In the engine-room, yes. So that they can put it on and pump them dry. The connections all lead off the one pump; you may have four or five connections leading to one bilge pump.

288 By Mr. Black:

Q. Four or five way valves? A. Yes.

By Mr. Kirlin:

Q. Are these all kept shut except the one attached to the pump that is working? A. Certainly.

Q. At all times at sea? A. Yes.

Q. Then, in the ordinary course, the valve at the other end of the strum pipes which lead into the No. 1 hold would not be open except when they wanted to pump? A. Yes.

Q. Was that the case on the morning when you

discovered this? A. As far as I know. The chief 289
engineer is the man that is responsible for that; but as far as I know.

Q. How often are the tanks sounded? A. Night and morning.

Q. How often are the holds sounded? A. Night and morning.

Q. And unless those soundings disclose water, do the valves of the strum pipes remain closed? A. Yes. When the soundings are taken the carpenter reports them to the chief officer, and marks them down on the blackboard inside the engine-room. The engineer has the watch, usually the second engineer, and reports late in the evening, and he pumps all the bilges out every morning and every evening 290
in the watch, and sees what is marked on the blackboard.

Q. Does he put the pump on when he has not soundings? A. No; he does not put the pump on if the bilges are dry.

Q. Do you know whether this particular hold was pumped out the evening before or sounded? A. I don't know; I don't remember. If there was water in the bilges they would have been pumped.

Q. (Book shown witness.) Is this log book in your handwriting? A. Yes, except the report of the hurricane, and there I was injured and was not able to do it for two days.

Q. On the 4th of September are the entries there 291
in your handwriting? A. Yes.

Q. Can you remember, without referring to your log book, whether any report was made of soundings or of the pumps on the day preceding the discovery of the leak? As far as I can remember, the usual report was made.

Q. What was that? A. Of two or three inches, possibly, no more. We generally have two or three inches in the bilges; but there was nothing extraordinary or I should have noticed it and logged it.

Q. When you received the reports from the carpenter as to soundings, do you make any note of

292 them? A. No, except to see they are marked on the blackboard in there. If the soundings are small I don't myself go and look at the board; but if there is any unusual amount of water in the well, say eight inches or a foot in the after well, I generally go and see that the thing is pumped out.

Q. But in the ordinary course? A. In the ordinary course the ship leaks so little and makes so little water that the carpenter marks it on the board and it is pumped out.

Q. When you come to write up the log do you refer to the board or what do you refer to as a basis for the entries you have in the log about the pumps? A. To the board and the carpenter's report.

293 Q. On the 4th of September you have the entry, "Pumps, lights and lookouts strictly attended to"? A. Yes.

Q. What does that mean? A. That means that the lights are put out at sunset; that the pumps in the wells and the holds have been sounded and pumped out, and that the lookouts are kept stationed at their posts after sunset.

Q. Is that entry correct, so far as the pumps are concerned, as of the date of the 4th of September? A. Yes.

Q. Is the entry on the 5th of September in your handwriting? A. Yes.

Q. When had you seen that bulkhead, especially
294 that part of it where you found the rivet gone, last before the morning of the 5th of September? A. Before we started loading.

Q. When did you see it before she started loading? A. When the holds were cleaned out. We cleaned out the holds after the outward cargo. After it is cleaned out we always go around and see if they are all right.

Q. Did you go down into the No. 1 hold yourself? A. Yes.

Q. Did you look at this bulkhead? A. Generally look around; not particularly.

Q. Was the tank filled up before—— A. The fore 295
peak tank was filled up afterwards.

Q. Was it full at all? A. It had been full before that.

Q. Before the accident? A. Yes.

Q. When? A. On the voyage before that.

Q. In port or at sea? A. The tank was filled on the Sunday after we left.

Q. You are referring now to the first time it was filled? A. I don't remember the first time it was filled, and whether we had it filled that first voyage or not. The other log books the captain sent home.

Q. Do you remember the tank being filled at all before this occasion? A. No, I don't think I do.

Q. Did you make any particular examination of 296
that part of the tank around the neighborhood of the broken rivet? A. Before?

Q. Before you loaded cargo for this voyage? A. No.

Q. Will you be able to state, from such examination as you did make, whether the rivet head was on or off at the time you left Grenada? A. I should say the rivet head was on when we left. It must have been on when we left, because we found it on top of the cargo.

Q. When did you find it on top of the cargo? A. When we found the tank was leaking, on whatever day it was.

Q. On the 5th of September? A. On the 5th of 297
September.

Q. How many rivet heads did you find off when you examined the tank on the morning of the 5th of September? A. Two, I think it was; two, yes. I picked up one, and the chief engineer picked up the other one.

Q. Did you see the chief engineer get the one that you say he got? A. I think I was up on the deck and looking after the plug when the chief engineer picked his one up.

Q. They were both found on the cargo, were they?

298 A. I think so, so far as I can recollect. I know mine was found on the cargo, the one I picked up.

Q. After you had picked up, or got possession of both of the rivet heads——

Mr. Black: He has not said he got possession.

Q. Did the engineer give you the other rivet head? A. I think so. I forget whether I had one or two rivets. I know I had the one.

Q. After you got the rivet heads that you did get, you and the engineer, was there any rivet head unaccounted for? A. I don't think so. I was too busy getting the cargo straightened out to learn much about the rivets then.

Q. What did you do with the rivet head finally
299 that you picked up? A. I believe I gave it to Mr. Kirlin.

Q. Did you go in the peak tank at all while you were in Grenada? A. No. The chief engineer was there.

By Mr. Black:

Q. In Grenada? A. In Grenada, or Trinidad, or on the passage, I forget which.

By Mr. Kirlin:

Q. What was the condition of the weather on the voyage from Grenada to New York, generally
300 speaking? A. I don't think I can remember without looking at the log book. I think we had strong winds.

Q. Did you have extraordinary weather on the voyage from New York towards Grenada in the month of August?

Objected to as irrelevant and immaterial.

A. Yes.

Q. What was it?

Same objection.

A. We met with a hurricane.
Q. On what date was that? 301

Same objection.

A. On the 20th of August.
Q. And how long did that hurricane last?

Same objection.

A. Until the 22d. This is not in my handwriting; I met with an accident.

Q. You met with an accident during the hurricane? A. Yes.

Q. Who kept the log? A. The second mate.
Q. What is his name? A. Theodore Ring.
Q. Do you recognize that as his handwriting? 302 (Log shown witness.) A. Yes.

Q. When do his entries begin? A. On the afternoon of the day of the hurricane.

Q. On the 20th? A. And until the morning of the 23d.

Q. Were you able to be about during that time? A. Yes; my hand only was hurt.

Q. What was the general condition of the weather and sea during that storm?

Same objection.

A. Very heavy.
Q. How did the ship behave during that time?

Same objection. 303

A. Labored and strained. Heavy seas.

Q. Did you use any means to abate the fury of the waves?

Same objection.

A. Oil.

Q. Are these entries which have previously been referred to as Claimants' Exhibit 5 an accurate description of the weather during that period?

Same objection.

304 A. Yes.

Q. When did you fill up the tank before you discovered the leak? A. On a Sunday evening, September 3d.

Q. What was the occasion of filling it? A. Because the ship was so much astern we thought she would go easier—steam better.

Q. What was the condition of the weather and wind during that time? A. Fine weather.

Q. In whose watch was the tank filled? A. In the 4-to-8 watch.

Q. Whose watch was that? A. The second engineer's watch and my own.

Q. Your watch? Who directed the tank to be
305 filled? A. I did—under the captain's orders.

Q. Was the ship stopped? A. No.

Q. How long did it take to fill it? Do you remember? A. About five or six hours. I don't remember. I was not on deck when the tank was full.

Q. What was the condition of the weather on the evening when the tank was filled? A. Fine weather.

Q. Is this entry on the 3d of September in your handwriting? A. Yes.

Counsel for claimants offers in evidence the entries for the afternoon of the 3d, as follows:

306 "12 Noon. Brisk breeze, fine weather, all sails set. "Course, N. N. W.; Wind E. by N.; 4.15, course N. "W. by W.; wind, E. by N.; 4.15, Navis, abeam dis- "tant 3 miles; 6; Basseterre (St Kitts) abeam.

"8 P. M. Wind N. E.; strong breeze and clear. "Log, 83 miles.

"9 P. M. Course, N. W. by N. 1/2 N.; wind E. "N. E.; pumps, lights and lookouts strictly attended "to.

"Midnight. Fresh breeze and clear.

"At noon observation: Latitude, 16° 26′ N.; "longitude, 62° 6′ W."

Q. What was the appearance of the iron on that part of the rivet head which you picked up? 307

Objected to on the ground that the witness is not competent, and that the rivet head is the best evidence of its appearance.

A. Clear break, as far as I could see.

Q. What was the appearance of the iron at the place of fracture?

Objected to on the ground that that is the best evidence.

A. I took no particular notice of it. It looked fair.

Q. Are you expert enough to tell whether a piece of iron freshly broken has a flaw in it or not? A. No; I scarcely think I should. 308

CROSS-EXAMINATION read by Mr. Black:

Q. How was the cargo that you had in this fore hold at the time of its receipt; in good or bad order? A. In good order.

Q. Did you take any note of what kind of cargo it was that was damaged? A. Cocoa. I noticed it was cocoa.

Q. Did you take any note of the marks? A. No; only when we were shipping it.

Q. At the time of its discharge in New York did you take any note of the marks or numbers of the damaged packages? A. No. Our clerks did on the dock. 309

Q. But you personally? A. Personally, no.

Q. Had you counted the packages or paid any attention to their receipt at the port of lading? A. Yes.

Q. Did you examine any of the bills of lading that were given for them? A. No.

Q. Didn't you ever see them? A. No.

Q. You signed receipts for them, didn't you? A. Yes, signed both receipts.

310 Q. What became of those receipts? A. They were sent to the agents.

Q. For what purpose were they sent to the agents? A. For the bills of lading to be signed on them, I suppose.

Q. And did not the ship have a list of the cargo which was loaded on board of her for the purpose of making up the ship's manifest? A. I suppose so.

Q. Who made up the manifest? A. The manifest was made at the office.

Q. What office? A. Agent's.

Q. In New York? A. No.

Q. At the port of shipment? A. At the port of shipment.

311 Q. Didn't you have anything to do with it afterwards? A. No, I had nothing to do with that.

Q. You had nothing to do with it? A. No.

Q. How many rivet heads have you picked up from ships you have been aboard of before? A. Well, old ships or new ships, old rivets or new rivets?

Q. No; new ships and new rivets? A. Might have picked up half a dozen or a dozen.

Q. Do you remember of having done so? A. No, not of having to examine them before.

Q. It is an uncommon thing to happen, isn't it, to have a rivet of a new ship come off? A. Yes, I think so.

312 Q. At the time you drove this plug where this water was spurting out, was the hole completely open, or was part of the rivet still in it? A. I didn't notice. The way the water was rushing out I should say the hole was quite open.

Q. Did you find any other hole through which the water was coming? A. No; the way the water was rushing along the tank, the flanges there, you couldn't scarcely tell.

Q. You did not see it spurting from any other place? A. No; not then.

Q. Did you at any time see these spurts at any

other place in that bulkhead? A. The next time we filled up the tank. 313

Q. When was that? A. I believe in New York, when the surveyor was down.

Q. Were you present at that time? A. I was not in the hold; I was looking down the hatch.

Q. You saw water spurting then? A. Yes.

Q. How many spurts did you see then? A. I didn't notice this tank so particularly.

Q. You saw some? A. Yes.

Q. Any more than one? A. I think so.

Q. When the other rivet head was picked up was it shown to you by the engineer? A. I believe it was.

Q. So you had it at some time or other in your hands, or in your sight, and know that two rivet heads were in existence which were found at the time this damage to cargo was discovered? A. Yes. 314

Q. What became of that other rivet head, so far as you know? Did the engineer keep it, or did you keep it? A. No, I only had one rivet head.

Q. The engineer kept one, did he? A. I suppose so.

Q. Did you make any search along this bulkhead to find out where that other rivet head came from? A. No, not myself. I believe the engineer and captain did.

Q. I am asking what you did? A. No.

Q. You did not, I understand you, go inside of the tank? A. No. 315

Q. Was the rivet head that you picked up lying directly in line below the place where the water was spurting on the top of the cargo? A. As far as I remember, I did not take particular notice to an inch or two.

Q. Was it fixed in your mind that your rivet head came from that hole? A. Came from that hole, yes.

Q. You associated them together? A. Yes.

Q. And did you definitely enough fix the location of that particular hole to say whether it was

316 where two plates lapped horizontally or vertically? A. No, I did not. If I did, I don't remember now.

Q. Did you fix its position with reference to other rivets so as to know whether it stood alone or was in line with other rivets? A. No, I took no notice.

Q. By any recollection, can you say now whether that rivet was the same size as the other rivets? A. No, I did not notice.

Q. How large was the hole which you plugged up? A. It seemed to be an ordinary rivet hole. I didn't measure it.

Q. Big enough to poke your finger through, I sup-
317 pose? A. Yes.

Q. Three-quarters of an inch or so? A. Yes, as far as I remember.

REDIRECT EXAMINATION read by Mr. Kirlin:

Q. Are you quite clear as to the number of rivet heads? A. I am not perfectly clear. I only know that I found the one.

Q. They wouldn't affect your recollection any? A. At the time when the tank burst, as soon as the captain and engineer were down, my desire was to get the cargo down and get the water out. I took very little thought about the tank after that.

Q. But do you remember seeing any other rivet
318 head in the engineer's hands besides the one you picked up? A. Yes, now, on second thoughts; but whether that was the one he picked up in the tank or another rivet I can't be sure.

Q. Would it refresh your recollection any to be informed that the engineer had testified that he did not pick up any rivet head?

Objected to. That is a method of refreshing one man's recollection by that of another man.

A. Yes, there must be two heads to the rivet; if I picked up one and he picked up the other one inside the tank. I know I saw him with one.

Q. The question was whether there were two off in the hole, or only one? A. That I can't remember. I only remember the one particularly. 319

RECROSS:

Q. Who was present at the time this tank was tested in New York, after the discharge of cargo here? A. When it was repaired here?

Q. Tested? A. Lloyds' surveyor.

Q. Congdon? A. Congdon and Captain Saunders.

Q. Mr. Martin? A. I don't know him. Who is he?

Q. A surveyor--a man with reddish whiskers? A. I don't remember whether he was there or not. 320

Q. Who did the repairs on it? A. I don't know. I believe it was the Morse Iron Works.

Mr. Kirlin reads deposition of RICHARD HOPKINS, taken on behalf of claimant, as follows:

By Mr. Kirlin:

Q. Were you carpenter on board the *Carib Prince* at the time the cocoa was injured by the leak from the fore peak tank? A. Yes; sir.

Q. The voyage was from Grenada to New York? A. Yes, sir.

Q. Last fall? A. Yes, sir.

Q. Did you see the cargo stowed in Grenada? A. Yes. 321

Q. In the No. 1 hold? A. In the No. 1 hold.

Q. How was it stowed? A. With fourteen or fifteen inches of dunnage on the floor.

Q. All over the floor? A. All over the floor, sir.

Q. Was it your business to make soundings of the different holds? A. Yes, sir.

Q. When did you do that on the voyage? A. Morning and evening, sir.

Q. How does the water get from the No. 1 hold to the engine-room? A. There is a pipe leads from the engine-room into the rose box in the bilges.

322 Q. Is there an iron bulkhead between the No. 1 and No. 2 holds? A. Yes, sir.

A. Are there any sluiceways on that bulkhead in the limbers? A. Yes, sir.

Q. Are they kept open or shut on the voyage? A. Shut.

Q When do you open them, if at all? A. In case the rose is blocked.

Q. At all other times are they kept closed? A. All times, yes, sir.

Q. What kind of a ship was the *Carib Prince* as to being water-tight? A. Very good, sir; very good.

Q. How much water did you usually find in the limbers? A. Say an inch or an inch and a half;
323 nothing to speak of.

Q. Where does your sounding rod go? A. Down to the bottom of the limbers.

Q. Do you remember on what day this leak was found? A. I think it was a Monday morning.

Q. How long before that had the tank been filled? A. I think it was Sunday night, but I am not sure about that.

Q. The night before you sprung the leak? A. Yes, sir.

Q. Did you sound the limbers in the No. 1 hold the night before you discovered the leak? A. I left word with the donkeyman when the tank was filled —or with a sailor—to tell me when the tank was
324 full.

Q. Did he notify you? A. Yes, sir.

Q. Did you examine it? A. Yes, sir, and found it full.

Q. Did you then examine the limbers in the No. 1 hold? A. I couldn't then; the cargo was in.

Q. Don't you sound the limbers every day when the cargo is in? A. Yes, sir; yes, sir.

Q. Then what do you mean by saying—— A. I mean I couldn't go down to see, to look inside. I sounded by all means.

Q. You sounded with the sounding rod? A. Yes, sir.

Q. Did you sound before they began to fill up the tank on that night? A. Yes, sir. 325

Q. And the next night? A. Yes, sir, certainly.

Q. And was it full both times? A. When I sounded at night, when I knocked off, the tank was full, and the next morning I sounded the tank and I found a deficiency in the tank; then I went to the limbers and I found there was water in it. I then informed the chief officer, and he and me went down and found the water in the No. 1 hold.

Q. On the night before you found the water in the No. 1 hold, did you sound the water in the No. 1 hold? A. Yes, sir.

Q. How much water was in the limbers? A. About an inch or two; I couldn't say exactly. 326

Q. Do you think it was the next morning after the tank was filled you discovered the leak? A. Yes, sir; it must have been, because I make an examination every morning and evening regular; so I think I am right in stating that.

Q. Did you go down below to help find out what was the cause of the leak? A. Yes, sir.

Q. And did you find it? A. Yes, sir.

Q. Did you do anything towards helping get the water out? A. Yes, sir; I bored holes to let the water run more freely in the limbers.

Q. And then it was pumped out of the engine room? A. Yes, sir; through these rows of boxes.

Q. Did you see the cargo when it was discharged in New York? A. Yes, sir; I think I was there. 327

Q. Did you take out the limber boards when you got to New York? A. Yes, sir; I do every voyage, to see if it is quite free for the water to run into.

Q. How tight were those limber boards? A. About middling, I should say; just a nice fit.

Q. Will water run through when they are down? A. Yes.

Q. Do you remember how tight you found them when you got to New York? A. Nothing to speak of; just as usual.

Q. Did you see the dunnage? A. Yes, sir

328 Q. As the cargo was discharged? A. Yes, sir.

Q. Was the dunnage in the usual way? A. Yes, sir.

Mr. Black reads CROSS-EXAMINATION:

Q. Did you have any fixed hour in the morning when you made your soundings? A. Yes, sir.

Q. What hour? A. About a quarter past six.

Q. Every day you made the soundings at that hour? A. Yes, about a quarter past six, and before five at night.

Q. How much before five? A. Say a quarter.

Q. Then you made them once in the morning and
329 in the evening? A. Yes, sir.

Q. Did you personally have anything to do with filling up the tank? A. Personally, sir; the chief officer, both donkeymen and myself see that the tank is filled all right.

Q. They pump the water from the engine-room through a pipe and into the tank? A. They pump it from the deck.

Q. How can they tell when it is full? A. Only by sounding, and when the air comes up the air pipe.

Q. That tells when the tank is full? A. Yes, sir.

Q. Whereabouts is the sounding well for No. 1
330 hold; at the after end, or forward? A. At the after end.

Q. Close up against the bulkhead? A. Close up against the bulkhead.

Q. Where is the key that works the sluiceway in that bulkhead? A. In the engine-room, in the stoke hole.

Q. That is worked by the engineer and not by you? A. It is worked by me as well as the engineer.

Q. Did you ever open that sluiceway? A. Yes, sir; I open it when I found the water wasn't going sufficient by the rose, then I opened the sluiceway.

Q. On this voyage? A. On this voyage; cer- 331
tainly.

Q. How did you find that the water wasn't going sufficiently fast for the rose? A. I thought not, sir; I wasn't sure, but going down———

Q. You went down in that hold? A. Yes, sir.

Q. How much water did you find down there? A. I couldn't tell exactly.

Q. Was it up to your ankles or your knees or up to your hips? A. Up to my knees.

Q. When standing on the dunnage? A. Yes, sir.

Q. And at that time you had removed the cargo from the limbers? A. Yes, sir.

Q. And you had removed it away at the after end close up to the rose? A. Yes, sir.

Q. And you saw the water gurgling and going 332
down? A. Yes, sir; and I thought it wasn't going fast enough, so I bored holes.

Q. How many holes did you bore? A. Five at each side, I should say.

Q. Five port and five starboard? A. Yes, sir.

Q. How big holes? A. Three-quarter holes.

Q. And the limber was a piece of plank running along the bilges and on top of the bilges? A. Yes, sir.

Q. And these holes were how close together? A. Six or seven inches together.

Q. All on the after ends? A. All on the after ends.

Q. How much water did you find on the forward 333
end of No. 1 hold? A. I couldn't say exactly.

Q. Was it over your boots? A. No, it wasn't over my boots.

Q. Midway of your leg? A. No.

Q. Up to your ankle? A. Up to my ankle; yes, sir.

Q. And that was top of the dunnage? A. Yes, sir.

Q. What kind of dunnage? A. All sorts—sort of wood.

Q. Rough wood? A. Rough wood; yes, sir.

334 Q. Thrown in loosely? A. Yes, sir; decent, you know, but not packed in tight, to allow the water and stuff to go through.

Q. These boxes of cocoa, were they wet? A. All the bottom tier seemed to be wet.

Q. Weren't any of the top tiers wet, too? A. Wet a little at the ends where the water was swashing up.

Q. The steamer would be rolling a little and the water would wash over? A. That is it exactly.

Q. You told me that you made soundings a little before five in the afternoon of that day; how long after that was it that the tank was filled; after the soundings? A I should think it would be nine
335 o'clock before the tank was filled up.

Q. What time did they commence to fill in? A. I can't say exactly; I should say about four o'clock; it takes a long time.

Q. They commenced to fill before you took the soundings? A. I kept sounding all the time she was filling up.

Q. I am asking about sounding in another place. You took the soundings at No. 1 hold a little before five o'clock; what time did they commence filling the tank with reference to that; before or after you had taken the soundings at No. 1 hold? A. I can't say.

Q. They filled the tank in the evening; isn't it
336 pretty sure that they filled it after you made your soundings? A. I can't be sure about that.

Q. You don't recollect that? A. I don't recollect that.

By Mr. Kirlin:

Q. Did you sound in No. 1 hold at the usual time? A. Yes, sir.

Q. On the evening when they filled up the peak tank? A. Yes, sir.

Q. And you found the water as you have previously stated? A. Yes, sir.

By Mr. Black:

337

Q. There was the usual amount of leakage—about an inch? A. Yes, sir.

Q. And you didn't ever pump it out much more closely than that? A. No, sir; I couldn't.

Q. Always left about an inch? A. Yes, sir.

DANIEL QUINN, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Black:

Q. What is your occupation? A. Iron shipbuilder.

Q. Connected with what company or works? A. 338
The Morgan Iron Works and Delaware River Iron and Ship Building Company.

Q. For how long? A. Thirty-five years.

Q. Have you had practical experience? A. Yes, sir.

Q. Know all the details of every branch of the business? A. I can't say as to that; I know some of it.

Q. The construction part of it you know all about? A. Yes, sir.

Q. Are you familiar with the way iron is put together in shipbuilding, iron and steel? A. That is my business.

Q. What is the phrase used among you gentle- 339
men when rivet holes don't correspond exactly one with the other and you want to fix it? A. They fair the hole.

Q. How is that done? A. By driving a drift pin in with a 4½-pound hammer.

Q. Is that what you call a drift pin, a tapered piece of steel? A. Yes, sir.

Q. The largest diameter of that would correspond somewhat near to the size of the hole which is to be driven? A. Yes, sir.

Q. And the smaller one, enough to enter where

340 they are not fair? A. Where they are not fair, yes, sir.

Q. In using that drift pin does it cut the iron at all? A. No, sir.

Q. What does it do? A. It upsets the hole so as to bring it to some angle to get the rivet in.

Q. What do you mean by upsetting? A. By driving that pin in a hole that is not fair it upsets one edge.

Q. What do you mean by "upsets"? A. Upsets the iron, drives the iron together, drives the iron together so it brings the hole fair at some angle so we can get the rivet in. The hole may not be squared with the plate, but at some angle so the rivet will
341 come in when it is hot.

Q. The effect of that is to enlarge the hole on both sides? A. It makes both oblong.

Q. Instead of round. In constructing a vessel with a ballast tank in her fore-peak, what part of the vessel is the knee-tie riveted to first, the side of the vessel or bulkhead? A. The plate is fitted in there and riveted wherever the rivet starts at; sometimes it is to the side of the ship and sometimes to the bulkhead.

Q. I want to know in a general way as to the method of construction. You have seen a great many English built iron ships? A. Yes, sir.

Q. Done repairs on them? A. Yes, sir; plenty of
342 them.

Q. Built at Glasgow and other parts of England? A. Yes, and France, Germany and everywhere else.

Q. What is the effect upon the bulkhead plates of a forepeak tank where the holes of the plate do not fair with the holes of the angle iron which is fastened to the knee-tie? A. It causes the lighter plate to buckle by driving the pin in. If the angle is heavier the light plate will buckle away from it until the hole becomes so the hole is perfectly fair at some angle or other to get the rivet in.

Q. If the last rivet, which connects the bulkhead

of a tank with the angle iron fastened to the knee- 343
tie, breaks off, what, in your judgment, would be the cause of that breaking?

Objected to. Taken subject to objection.

Q. If it was known to you that the holes of that rivet didn't fair? A. I would consider as long as the hole wasn't fair that probably it was crystallized; the rivet was probably broken after the tank had been made. Again, there is another cause for that. In fairing a hole like that, the rivet came in at an angle, and when the rivet was driven in it was driven when it was too cold and crystallized, because sometimes when the rivet does not come in very hot they will drive it anyhow, when it is black, especially 344
when they are doing piece work, and that rivet probably broke in the centre and both sides had stayed in the hole.

By the Court:

Q. If under such circumstances it broke, it broke exactly in the centre? A. In the centre between the two plates.

Q. That is where it would break? A. That is where it would break, and both pieces remain in there.

By Mr. Black:

Q. In this particular case the rivet head broke at 345
the outside of the tank-sheet or bulkhead? A. The clinch came off.

Q. And when that rivet was driven out of that hole, if it was found the hole did not fair, and it was the extreme rivet, the innermost rivet of the knee-tie, what would you say would be the cause of that breaking off? A. Extra pressure in the tank.

Q. You prepared a little diagram here showing the way in which the rivet holes not fairing would cause the plate of the bulkhead to spring off from

346 the knee-tie and angle-iron. Explain that if you will.

Mr. Kirlin: I don't understand that question.

A. Yes, sir.

Counsel for claimants objects, that there is no evidence the rivet holes were not fair after the rivet was out.

Q. Explain the diagram? A. That is right.

Q. What is the way in which that strain comes to produce the breaking of the rivet? A. By an extra strain inside of the tank if the tank wasn't full of water.

347 Q. I am asking about the rivet holes not being fair; when you bring the drift-pin into those holes to draw the rivet holes into line and some of the rivets are set up and clinched, does that produce any greater strain on one part than another?

Objected to, that the evidence is exclusive of any such theory as that. The testimony of the engineer showed that the plate had not been buckled by bringing the holes fair, because they were not fair, and this question relates to a situation where the holes had been made fair and buckled thereby; that it is a hypothesis not resting upon any evidence in the case.

348 The examination is suspended.

BENJAMIN J. CLARK, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Black:

Q. What is your business? A. Marine inspector and surveyor.

Q. How long has that been your business? A. Three years.

Q. Connected with what association or company? A. The National Board of Marine Underwriters.

Q. Have you been a sea captain? A. I have. 349
Q. How long? A. Thirty years.

By Mr. Kirlin:

Q. What kind of vessels? A. Sailing vessels.
Q. Wood or iron? A. Wood.

By Mr. Black:

Q. Have you inspected, in your three years' experience, very many iron vessels? A. I have.
Q. Are you familiar with them? A. Quite familiar.
Q. Did you visit the steamer *Carib Prince* in September, 1893? A. Yes, sir. 350
Q. On what date? A. September 15th.
Q. Did you go into her lower No. 1 hold? A. Yes, sir.
Q. Tell us what you found there as to the condition of the rivets of the peak-tank? A. I found two rivets entirely out and nine leaking.
Q. You say the rivets were entirely out of two of the holes; was there anything in the place of those rivets? A. Two pine plugs.
Q. What was the position of those holes where the two rivets were out? A. They were about on a line on the angle iron, little on the port side.
Q. Both of them on the port side? A. One on the starboard and one on the port side at the angle iron. 351
Q. Did they correspond in position; was one about the same distance from the side and the same height up? A. Same horizontally.
Q. How high above the floor of No. 1 hold were the rivet holes? A. I didn't measure it; I should judge about five feet.
Q. Somewhere up to your eyes as you stood on the floor? A. Yes.
Q. How far away from the side of the ship was the port one? A. About two and a half feet.

352 Q. And the starboard one how far from the side? A. I should judge about three or four feet.

Q. What were in those holes when you saw them? A. Soft pine plug.

Q. Did you remove either of them? A. One.

Q. Which one? A. On the port side.

Q. Describe what you found on removing that plug in respect to the fairing of the rivet hole through the plate, bulkhead plate and the angle iron at the top of the tie-plate? A. The iron wasn't fair between the two plates.

Q. You mean the hole? A. The iron on each plate wasn't fair.

Q. Did you find anything on the plug itself to
353 show whether it was fair or not? A. No, sir.

Q. Was the hole where the plug had gone through smooth all the way along? A. No, sir; it showed smaller on the inside than it did on the outside.

Q. The plug was a round one or oblong? A. Round.

Q. On the outside of the No. 1 hold side of the bulkhead it was round? A. On the port side, yes, sir.

Q. What was the difference of the untrueness of those two holes in respect of fairing? A. It didn't appear to be fair in the hole between the two plates.

Q. How much? A. I didn't measure it; I couldn't say.

354 Q. How much? A. About an eighth of an inch.

By the Court:

Q. One plate slipped by the other an eighth of an inch? A. Apparently. It was rounded on the edge of the inner plate.

By Mr. Black:

Q. Did you pull the plug of the other hole? A No, sir; I didn't pull the plug of this.

Q. Who did? A. The chief engineer.

Q. You saw it in his hands? A. I took it in my 355
hand after he pulled it.

Q. How about the plug on the other? A. He didn't offer to pull it, nor I didn't pull it.

CROSS-EXAMINED by Counsel for Claimants:

By Mr. Kirlin:

Q. Did you put your fingers through that hole? A. Yes, sir.

Q. Was there a sharp edge to the inside of the hole on the angle iron where it came against the plate? A. It was battered; the iron was on the inside plate.

Q. How could you tell that? A. By my finger. 356

Q. What was the evidence of its being battered? A. The rough smoothness of the iron where the bolt had gone through.

Q. How could you tell the extent to which it didn't fair accurately? A. By the looks of my eye; by my eye.

Q. Was it light there? A. It was light from the hatch; the whole hatch was off.

Q. Was there any light in the fore peak? A. No, sir; it didn't require it.

Q. Could you see from a light place in to a dark place? A. I could see enough to see the two plates.

Q. Can you swear accurately as to how much the holes lacked of being fair? A. I could not; I didn't 357
measure it.

Q. Pretty hard work to swear between an eighth and a sixteenth of an inch, wouldn't it be? A. I think it would.

Q. The angle iron was on the inside of the tank, was it not? A. Yes, sir.

Q. Did you notice whether it came tight up against the plate of the bulkhead? A. I didn't go inside of the tank.

Q. You put your finger in? A. From the outside of No. 1 hold.

358 Q. As you put your finger in there did you feel any space between the inside of the bulkhead plate —that is, the side in the tank -and the side of the angle iron which was next to the plate? In other words, did the angle iron appear to be sprung off any from the plate? A. I couldn't tell about the angle iron, but I could run my finger through it; I couldn't feel any space between the angle iron and the plates.

Q. It was just smooth where you put your finger there? A. It was just smooth.

Q. Except as you have specified? A. Except where I put my finger on the turn of the two plates one was little more off on the starboard than on the
359 port, inside.

Q. What plate do you mean; what two plates? A. The two plates riveted together upon the angle iron.

Q. How many plates were there altogether? A. I didn't count them.

Q. Were there more than two? A. Yes, sir.

Q. What would the third one be; one would be the bulkhead and the other the angle iron? A. The whole bulkhead is constructed of plates.

Q. There wasn't but one bulkhead plate? A. That is all.

Q. Another plate was the angle iron; what was the third? A. There was a lap on the plates.

360 Q. The lap on the plate and the angle-iron——

By the Court:

Q. Did it go through three thicknesses of iron or two? A. Two thicknesses and the angle iron.

By Mr. Kirlin:

Q. Which one was it wasn't quite fair, the angle iron or the bulkhead at the other plate? A. It was the second plate.

Q. The innermost plate? A. Yes, sir.

By the Court:

Q. The middle plate? A. The middle plate; yes, sir. 361

By Mr. Kirlin:

Q. It appeared to be about a three-quarters of an inch hole? A. About a three-quarters of an inch hole; I didn't measure it.

DANIEL QUINN resumes the stand and testifies:

By Mr. Black:

Q. Now I come back to my original question; I will repeat it in these words: Suppose that the fore peak tank was formed by a bulkhead of plates crossing the vessel athwartship and riveted to an angle iron and knee-tie, which angle iron and knee-tie were riveted to the side of the ship: what would be the effect on that bulkhead of the rivet holes not fairing, if anything? 362

The Court. This water came through a hole and that is the hole we are speaking of that is not fair.

Mr. Black: I contend that the effect of not fairing the rivet holes on the horizontal line will be to bring a strain on that bulkhead at the extreme end of this knee-tie, which was the rivet which broke off in this case.

Mr. Kirlin: There is no evidence that any other hole was not perfectly fair. 363

Mr. Black: Not beyond the fact that they testify on their commission in England that there was a drift-pin constantly used in construction.

The Court: I cannot find from that evidence that there is a row of rivet holes that is not fair, as your picture shows.

Q. The clinch of a rivet on the bulkhead which forms the fore-peak ballast tank has broken off;

364 that is the extreme innermost rivet on a line of rivets which connect that bulkhead to the knee-tie, which is riveted as well to the side of the ship; what, in your judgment, would be the cause of the breaking off of that clinch of that rivet?

Mr. Kirlin: The next two rivets to that also started; that should be asked.

A. There are several causes for that.

Q. State what they were? A. In the first place, one cause would be that the plate, that the gusset-plate fitted to the side of the ship and also fitted to the tank, wasn't well fitted; that the holes were not
365 punched fair on the side of the ship or not fair on the bulkhead, where in pinning them together to rivet the angle iron to the top of the gusset-plate, which put the strain either on the side of the ship or bulkhead.

Q. You say "gusset-plate"; what do you mean by that? A. That is the knee-tie; they are the same thing.

Q. On which of the rivets of that knee-tie would the greatest strain come if the holes were not fair?

Mr. Kirlin: That would depend on which ones were not fair apparently. I object.

Q. Does this diagram show what you mean by
366 not fairing on the gusset-plate? A. Yes, sir.

The diagram is offered in evidence as an explanation.

Objected to, that it appears on the examination of it that out of seven rivets, all of them are at least half out of the way, and there is no evidence in the case that any kind of holes did not fair except one.

It is marked Libellants' Exhibit 2.

Q. Did you also prepare me a diagram showing what would be known as buckling of the plates caused by that same effect? A. Yes. 367

Counsel for claimants objects that there is no evidence in the case of any buckling. It is without foundation.

The second diagram is offered in evidence and marked Libellants' Exhibit 3.

By the Court:

Q. Have you given all the things that could make that clinch come off? A. No, sir.

Q. Give some more? A. I will give another one. If the ballast tank was not sufficiently braced in the centre and those knee-ties extended only four feet from the side of the ship, and the tank was only half full of water, and the ship heaving and pitching in the seaway, it would bust those rivets off. 368

Q. Shall I understand that the rivet heads of a rivet like this have sometimes broken by seaway? A. Yes, sir; that is another cause. Another cause would be crystallization of the rivet or hammering on it when it is cold.

By Mr. Kirlin:

Q. Another, bad iron? A. And another might be that it was very poor material. That is four. Another one would be by putting extra pressure on the tank when the top is full of water and the pump working on the tank and the tank full. 369

By the Court:

Q. That is to say, where there is any unusual strain it is common enough to have them break off the clinch.

370 By Mr. Black:

Q. If the rivet holes didn't fair, and were found not to fair when the rivet broke and came out, would that in itself cause a weakness to the rivet, to the clinch of the rivet?

Objected to unless the witness states how much.

A. If a rivet is driven in at an angle, it has not the same strength as a rivet driven through a fair hole.

CROSS-EXAMINED by Counsel for Claimants:

371 By Mr. Kirlin:

Q. How long have you been working in iron? A. Since 1855.

Q. As an old and experienced shipbuilder, you don't mean to say that a rivet would be very much weakened, a three-quarter-inch rivet, by being from a 16th to an 8th of an inch out of line if it was put in hot and properly riveted, do you? A. I do.

Q. How much? A. I maintain it would take off about one-third of its strength; and I will explain that to you if you wish.

Q. How much is the strength? A. About 6,000 pounds would be about the strength of a three-quarter rivet. That is an inch and three-quarters
372 clinch; to pull that off, it would require that pressure.

Q. I understand the effect of your evidence to be that having the rivets in holes that were not fair subjects the rivet to a greater sheering strain, not to a greater fore-and-aft strain? A. To a greater fore-and-aft strain.

Q. Is that what you mean? A. I do.

Q. It wouldn't make any difference in the sheering strain? A. The sheering strain would be acted upon by the pressure on the outside of the vessel athwartships.

Q. If next to the rivet head which was gone off wholly two rivet heads were started, and if you were informed that the rivet head which was gone, was broken with a fresh break, would your judgment be affected at all by those circumstances? A. By the circumstances of what way the tank was in at the time; that is the way my judgment would be affected. 373

Q. If you were informed that the two rivets next to the one that broke had started by apparently the same strain which broke the one, and that the one when broken broke with a fresh break, would that indicate to you that the breakage was due to latent defect, or to the hole in this particular case not being quite fair, or to the fact that there has been some overstrain which affected all three of these rivets alike? A. That there had been some overstrain I should judge to break them off. 374

By the Court:

Q. Would you reject a piece of work where a three-quarters of an inch rivet had been driven in hot, the hole not fairing from the 16th of an inch to little more, perhaps? A. No, sir; it is done every day.

Q. And called good work? A. Yes, sir.

REDIRECT by Counsel for Libellants:

By Mr. Black: 375

Q. At the same time you would say it weakens the rivet to drive it in in that way? A. Yes, sir.

Q. Does it also produce a greater or necessitate a greater degree of pounding to get that rivet in? A. Only the head don't lay up fair on the inside and it causes the head to be bent, which may cause fracture of the head inside if the head is a little cooler than the clinch.

Q. You have made these models, showing the form in which the iron is put together? A. I have.

376 Mr. Black: I offer them in evidence to show the resemblance.

Mr. Kirlin: They are not shown to have any resemblance to the original.

Mr. Black: The testimony of the witnesses are that that tank was filled on the 3d. There is no entry like that on the log, but on the date of the 5th of September is the entry——

Mr. Kirlin: The log was not kept by any servant of the shipowner or ship.

Mr. Black: The entry is:

" 5th of September, 1893, Tuesday. On sounding the fore peak tank this morning it was discovered to have been leaking, and on taking off the fore hatches
377 a quantity of water was found in the lower hold, damaging the cargo of cocoa, bitters, and so forth. The wings were cleared on the after part and the water drawn away as fast as possible, and the tank at once was pumped out."

Mr. Kirlin: I object to the entry on the further ground that it appears from the oral evidence taken that this leak was discovered on Monday. It makes this difference, that I think these men in order to exculpate themselves from the impropriety of filling that tank while the ship was going, have put that entry in there on the wrong date to try to make us believe that they had it filled a day before they
378 discovered the leak.

Admitted subject to objection.

Adjourned to Monday morning, June 18, 1894, at 11.30 o'clock.

BROOKLYN, N. Y., June 18, 1894. 379

Met pursuant to adjournment.

OWEN MCGOWAN, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. Kirlin:

Q. What is your occupation? A. Foreman shipbuilder and boiler maker for John N. Robbins.

Q. Did you do any repairs on the *Carib Prince* last September at your yard? A. No, sir; not at the yard, but at her pier.

Q. You were called to do some work on her, were 380
you? A. Yes, sir.

Q. For Mr. Robbins? A. For Mr. Robbins; yes, sir.

Q. Where did you go? A. Where did I go?

Q. Where was the ship? A. Laying up at Hunter's Point. I think at the foot of Seventh street.

Q. You did some work about the rivets in the bulkhead? A. Yes, sir; in the water-tight bulkhead forward.

Q. How many rivets did you find leaking? A. In all I think about seven or eight required to come out.

Q. Was there any in the countersink off? A. There was one, I think one.

Q. What was that on? A. It was in the bar running athwartship about five or six feet from the bottom, I should say. 381

Q. Was that what was known as the knee-tie? A. The knee-tie; the fore-and-aft side of the tank running athwartship, on the bulkhead; one was gone; the countersink was off on the starboard side.

Q. Did you knock out any rivets in that plate and put in any others? A. We knocked out two or three on that bar and some on the side of the tank.

382 Q. After you knocked out those two or three what was the condition of the holes; were they blind or fair? A. The holes were all right. It couldn't be blind where you put a rivet $\frac{7}{8}$ or $\frac{3}{4}$ out and put one in again. I don't remember whether they were $\frac{7}{8}$ or $\frac{3}{4}$.

Q. These rivets went through two or three pieces of iron? A. They went through down in this case, the angle iron and the plate itself.

Q. There was a hole in the plate and a hole in the angle iron? A. Yes, sir.

Q. Now, what I want to know is whether those two holes were right opposite each other or not? A. They were right opposite as near as is practi-
383 cable; we couldn't say to a thousandth part of an inch, but as near as is practicable in the work of good shipbuilding.

Q. Were they near enough to get a rivet of the size of the hole in? A. Oh, yes; we drove them up.

Q. Did you do the work? A. I directed the driving of them; my men did it.

Q. You had charge of the job? A. I had charge of the job.

Q. Were there some on the other side? A. Some on both sides, on this bar running athwartship.

CROSS-EXAMINED by Counsel for Libellants:

384 By Mr. Black:

Q. Whom do you work for? A. John N. Robbins.

Q. How long have you been in their employment? A. Four years, in charge of the work.

Q. What is your position? A. Master shipbuilder and boilermaker.

Q. Whom did you get your instructions from to go up to the *Carib Prince?* A. My instructions come through our office, from our superintendent.

Q. What were they? A. To go to the *Carib Prince,* at the foot of Seventh street, Hunter's

Point, and find out what was the matter with the water-tight bulkhead forward in No. 1 hold. 385

Q. Did you go alone, or take some men with you? A. I went alone.

Q. Do you remember the date? A. I can't exactly say; some time about September.

Q. Might it have been October? A. I have the dates in my time book.

Q. Let us have the date? A. I haven't it here with me.

Q. Did you look at it this morning? A. Yes, sir.

Q. Didn't you know you would be wanted to fix the time? A. No, sir.

Q. How many times did you go there? A. Once.

Q. Only once. What did you do the time you went there? A. Examined the work and found out what was to be done. 386

Q. Then you sent men to do the work? A. Yes, sir.

Q. You were not there when the rivets were knocked out yourself? A. No. One rivet was out while I was there.

Q. You didn't see the other rivets knocked out? A. No.

Q. You only saw one gone? A. Yes, sir.

Q. Was there anything in that hole where the rivet had been when you went there? A. Nothing, practically; the countersink was off; nothing but the head hanging on.

Q. What do you mean by "countersink"? A. The side the rivet was drove on; there is a head and point on the rivet and it was drove on the pointed side. 387

Q. Is this the kind of rivet you use which I show you? A. Yes, sir.

Q. Which do you call countersunk, the big end or point? A. We drive on this point and it is drove to another head and forms the countersink.

Q. The countersink is what is called the clinch? A. We don't call it that.

388 Q. But you mean the same thing as the clinch? A. No, we never apply that term to it.

Q. You have heard the word "clinch"? A. Yes, sir; but we don't use that term for it. It is what I call driving a countersink head on the rivet.

By Mr. Kirlin:

Q. The place where this end is driven on to fit in is countersunk in the plate? A. Yes, sir.

By Mr. Black:

Q. What you call countersunk is where the end of the rivet is headed up to fasten two plates to-
389 gether? A. Yes, sir.

Q. Where was this one hole where there was no rivet, on the bulkhead? A. On the athwartship bar about six feet from the bottom, on the bulkhead.

Q. Are you speaking of a bar on the inside of the tank? A. On the inside of the tank; yes, sir.

Q. Were you in the inside of this tank? A. No, sir.

Q. How did you find out this rivet was gone from the bar on the inside of the tank? A. You could see it while you stood and looked at it.

Q. Did you have a light? A. There was plenty of light; it was daylight.

Q. Did you see any place where there was a plug driven in any rivet hole? A. No, sir; no, sir.
390

Q. Did you look on the starboard side of that same bulkhead to see whether there were any rivets broken on that side? A. I looked on the starboard and port sides and marked what was to come out and ordered it out.

Q. Did you make a written report of what you found? A. Yes, sir.

Q. What has become of that? A. I returned that to the office.

Q. Please produce it? A. I don't know as I can produce it now. It might be in our office.

Q. You knew you were going to testify about this thing? A. I understand about that. 391

Q. Have you looked at that written report? A. No, sir.

Q. How many men did you send up to do that work? A. One gang of riveters.

Q. How many men? A. Four.

Q. Are they here in court? A. They are not; no, sir.

Q. Are any of them here in court? A. No.

Q. Was there a bolt with a nut on it in that rivet hole when you visited there? A. No, sir.

Q. Did you know of any bolt with a nut on it being put in there for the purpose of temporary repairs? A. Not visible to me at the time I looked the work over. 392

Q. How long after you went there were the men sent to do the work? A. The following morning.

Q. They were instructed to make permanent repairs? A. They were instructed to make repairs satisfactory to the engineer.

Q. You sent with them what set of tools? A. The number of rivets required to do the work.

Q. With a forge to heat the rivets in? A. Yes, sir.

Q. And the necessary appliances for heating and putting them in hot? A. Yes, sir.

Q. And to do it just as if you were doing new work on a new job? A. To do it to the engineer's satisfaction. 393

Q. To do it just as if you were doing new work on a new job? A. To do it to the best of our ability.

Q. Did you make any inspection of that particular hole where the rivet was missing? A. No, nothing particular; nothing special.

Q. Do you remember the size of it? A. Not to a sixteenth of an inch.

Q. Do you remember to an eighth of an inch? A. No, I do not. Indeed we don't do that fine.

394 Q. Was there a double row of rivets there, or single? A. Single on the one bar.

Q. Only one angle iron? A. That was the bar that was damaged. Yes, one angle iron.

Q. And this one rivet that was gone was at the extreme end of the gusset-plate? A. No; not exactly at the extreme end.

Q. It was the last rivet, wasn't it? A. I couldn't say as to that certainly.

Q. Do you know or have you heard that temporary repairs were made upon this bulkhead prior to your men going up to make the final repairs? A. I didn't know anything about it.

Q. Where that bulkhead comes that is formed of
395 sheets of metal, isn't it? A. Yes, sir.

Q. How do those sheets run, horizontal or perpendicular? A. Perpendicular, to the best of my opinion now.

Q. What fastens those sheets together? A. They fasten to each other.

Q. Are they lapped or butted? A. They are lapped.

Q. And a row of rivets where the laps come? A. Yes, sir; a row of rivets.

Q. Was the hole of the rivet that was gone through one of those lap-joints or not? A. That I can't be certain of now.

396 THOMAS CONGDON, recalled for claimants, testifies:

By Mr. Kirlin:

Q. There is some discrepancy between your testimony and the testimony of one of the other witnesses as to where the rivet was in the bulkhead, that was gone. Did you make any note of that? A. No. My notes are to the effect that there were several rivets in the bulkhead strained and leaking; I didn't specify where they were. When I said on Friday they were in the vertical bar, that is to the best of my recollection they were there.

Q. The vertical and horizontal bars are not far apart? A. No; one might easily be mistaken on looking at the outside of the bulkhead. 397

Q. So you may have been in error? A. It is only according to my recollection.

Q. Was there any rivet gone on the bulkhead but the one? A. No; I only saw that one.

Q. Do you know whether there is any rule amongst navigators as to filling tanks at sea, whether a vessel should be stopped or whether they can fill them in motion? A. The rule of common sense is the only rule I know about. It is a very unwise thing to fill a tank at sea.

Q. What do you say as to the prudence of filling a tank with the ship going ahead? A. I should say it was a very improper thing to do. 398

Q. Why? A. Because when the tank is partly full of water and the ship is in motion it swashes about and is liable to break on the bulkhead. I have seen a bulkhead knocked flat on the ship's bottom where the tank has not been full; the ship rolling and water swashing knocked the bulkhead right down.

CROSS-EXAMINED by Counsel for Libellants:

By Mr. Black:

Q. Did you notice how high the stand-pipe of the forward tank was? A. No; I did not.

Q. You made a statement here the other day when you were on the stand to the effect that that tank came up to the main deck of this ship. Are you prepared to say that now? A. What I call the main deck is below what is called the spar deck. There is one deck above the tank deck. 399

Q. The tank deck was on the line of the between-deck beams, wasn't it? A. I think there is one deck above that.

Q. That tank has been testified to be 20 odd feet deep. Would you, from your recollection of that

400 vessel, say whether she had any height above that 20 feet more than the space of the between-decks? A. I should say she had one height of between-decks above that, as far as I can recollect, above the top of the tank.

Q. How high was that above the between decks? A. Seven feet.

Q. That would make the distance from the floor of the vessel up to the level of the main deck 27 odd feet, wouldn't it? A. You are calling the main deck——

Q. I am calling the main deck the top of all the decks? A. That is the top, the spar deck. I think I am right in calling that the spar deck of the ship,
401 and the main deck would be the next below,

Q. The deck on which the hatches are, which is the top deck for taking in the cargo before you lower it to the hold; is that not called the main deck? A. I call that the spar deck.

Q. Below the spar deck or main deck was there a space before you came to the top of the tank? A. One space of about seven feet.

Q. Wasn't there a stand-pipe in that space? A. No. The stand-pipe is taken away when the tank is finished; it isn't left there.

Q. They connect the tank with the pump, do they not, in order to fill it? A. Yes, sir.

Q. Isn't that done through the stand-pipe? A.
402 The water is forced from the donkey-pump up into the tank; it doesn't come to the top.

Q. Is that your knowledge? A. That is the common way.

Q. Are you aware that the *Carib Prince* was, or was not, built in that fashion? A. I can't say; I don't remember.

Q. If the officers of the *Carib Prince* testify the tank was filled from the deck and not from below? A. They were probably right.

Q. Then there would be a stand-pipe, wouldn't there? A. It isn't necessary; that is not necessary.

Q. Do you know anything about hydraulic pressures? A. Tell we what you want to know. 403

Q. Do you know how many additional pounds or tons pressure is brought on a bulkhead by the increase of one foot in a stand-pipe? A. Yes, sir.

Q. In a bulkhead of the size of that of the tank of the *Carib Prince* how much additional pressure would be brought on that bulkhead? A. I must know the area of the bulkhead.

Q. You saw the bulkhead, didn't you? A. I will tell you that about six or seven or eight inches rather, in this stand-pipe would be about a pound pressure on each square inch of the bulkhead, and you can easily calculate the whole thing.

Q. Would a pressure of that much on that bulk- 404
head be as great as, or greater than, the pressure caused by the water being in movement when the tank was not full? A. Nothing to compare it to; you can't compare the two.

Q. You think there is nothing in the nature of forces that you can compare between pressure and impulse? A. The swash is the more severe of the two on the bulkhead, most decidedly.

Q. If the sea is smooth and the steam vessel is not rolling, would the tanks suffer any extraordinary strain by being filled at sea? A. If the water is perfectly smooth, of course it couldn't suffer. If there is motion of the ship, either rolling or plunging, it naturally would.

Q. If there is no such motion, there is no danger 405
of that? A. Quite so.

Q. It is due to the surge of the water coming with an impact on the bulkhead? A. Exactly.

Q. Wouldn't such an impulse as that have a tendency to snap off a great many heads of rivets? A. I have seen a bulkhead knocked right down.

Q. That meant a great many heads were torn down? A. I don't know what preceded it.

Q. Can you tell me for what purpose, in the con-

406 struction of iron steamers, there will be bilges put in her and limber boards put on top of those bilges? A. Yes.

Q. What is the purpose? A. To make a water-course there.

Q. To make a water course in the interior of the vessel? A. In the bilge of the vessel.

Q. And to keep the holds dry? A. And to keep the holds dry.

Q. And to protect the cargo from being damaged by an accumulation of water? A. Yes, sir.

By the Court:

407 Q. And the limbers are to take out; the purpose of the limbers is to reach the bilges and clean them out? A. The limbers are boards covering the water-course.

Q. And they should be made so as to lift out? A. They are always made so.

Q. Are you speaking of your knowledge or your supposition? A. My knowledge.

Q. Have you examined all the limbers of all the ships that have been inspected? A. I have seen thousands.

Q. Have you in some instances seen them so tight they wouldn't lift out? A. I don't think I have.

Q. It hasn't been your duty to examine the lim-
408 bers of all the vessels you have seen? A. It is the easiest thing in the world to lift limbers where I have seen it done.

Q. When it became necessary to bore holes in those limbers to let water out, doesn't it show you the limbers are too tight? A. No.

Q. Doesn't it indicate that the water wouldn't run through—the purpose of boring holes to let the water through?

Mr. Kirlin: I object.

FRANK S. MARTIN, recalled for claimants, testifies: 409

By Mr. Kirlin:

Q. What is the date of the survey you made on the *Carib Prince?* A. September 11th and 12th.

Q. How long was that after she got in? A. About a couple of days.

Q. Did you examine the rivet heads in the strengthening pieces as well as in the cross-bar? A. I did the second day, yes, where they were leaking; I saw them on the second day after the tank had been filled; then I examined the rivets there.

Q. Was there any rivet gone on the strengthening pieces? A. No.

Q. You heard Mr. Congdon's testimony? A. 410
Yes.

Q. Was he in error as to where the rivet head was that was gone? A. I think he was.

Q. You examined the same place where his recollection was that the head was gone, did you?

Objected to as an inference.

Q. Did you see any head gone there? A. I didn't see any.

By the Court:

Q. You didn't see any rivet gone? A. Yes, I did; 411
I saw one, but not in the place Mr. Congdon saw it.

By Mr. Kirlin:

Q. Did the knee-tie extend over as far as the first lap in the plates in the bulkhead? A. No, sir.

112 HERBERT VERNON SAUNDERS, recalled for claimants, testifies:

By Mr. Kirlin:

Q. Do you know anything of the class of this vessel as compared with other vessels of her size?

Objected to as immaterial and as hearsay. Taken subject to objection.

Q. What is your relation to Mr. Knott, and the source of your knowledge? A. I had direct communication in my office from Mr. Knott himself when the question about this boat was raised, to prove——

Objected to.

413

Q. Do you know anything more about it; were you in England when she was built? A. I was in England when she was finished; I was on her trial trip; I saw the last test made of the ship.

Q. Did you see or know anything then as to what her cost had been, from the owners or builders? A. I know she cost considerably more than the ordinary steamer.

Counsel for libellants objects to the answer as hearsay, and moves to strike out all the testimony with regard to the cost of the steamer. Motion denied.

414 Q. Do you know Captain Legge, who commanded the *Carib Prince?* A. I do.

Q. Who commanded the *Carib Prince* at the time of this accident? A. I do.

Q. How long have you known him? A. About twelve months.

Q. What other commands has he been in besides this? A. The steamship *Alps* belonging to the Atlas Line.

Q. Is he now in command of another vessel? A. Now in command of the steamship *Irrawaddy.*

Q. Does she belong to Christall? A. She belongs to Mr. Christall.

Q. Do you know of his skill and capacity as a mariner? A. I know he has a first-class certificate as master mariner. 415

Q. Do you know the engineers and officers? A. I know the chief engineer is what we call a "guaranty man."

Q. Do you know anything of the qualifications of Captain Scott now in command of the vessel? A. I know we consider him a good man.

Q. Has he been in command before? A. He has been in command before.

Q. And Captain Legge also? A. And Captain Legge also.

Q. Your criticism of him relates solely to the filling the tank on this particular occasion without stopping the ship? A. Yes. 416

CROSS-EXAMINED by Counsel for Libellant:

By Mr. Black:

Q. When did you first know Captain Legge? A. Last June.

Q. That is when this vessel came out new, isn't it? A. That is when the vessel came out new.

Q. He was the captain who came on board of her in England, or wherever she was finished, to bring her over to New York, was he? A. He was sent over by Mr. Christall to superintend the building of the ship. He was on the ship four or five months before she left the yard. 417

Q. What did you say about "sent over"? A. He was sent over by Mr. Christall.

Q. How do you know that? A. I know it.

Q. Somebody told you? A. I was there and saw him there.

Q. How do you know because of seeing him there that Mr. Christall sent him there? A. Because I know he represented Mr. Christall.

Q. Somebody told you? A. Nothing of the sort.

Counsel for libellant moves to strike out the testimony of the witness concerning Captain

418 Legge being sent over by Mr. Christall as hearsay. Motion denied.

Q. Didn't he bring that vessel over to New York? A. He did.

Q. Wasn't Mr. Keyes the chief engineer who brought the vessel over? A. He was.

Q. And the other engineers and first officer came over? A. The first officer did not.

Q. Mr. Scott? A. Mr. Scott.

Q. He joined her here? A. He joined her here.

Q. From what ship? A. I believe he came out of the *Alps*.

Q. And the carpenter, was he in her when she came over? A. The carpenter was.

419 Q. Does the *Irrawaddy* belong to the same owners as one of your line? A. No, sir.

Q. He is running for Christall? A. She belongs to Christall.

By the Court:

Q. Where does Christall live? A. In New York.

Mr. Black here sums up the case for libellants.

Mr. Kirlin: If your Honor please, Mr. Black in his argument makes a suggestion about the strain coming in a certain place, and Captain Saunders in-
420 forms me there are beams inside of the tank. I would like to show that additional fact, and that the strain does not come from the side of the ship, but is taken by the transverse beams in the tank itself.

Mr. Black: My witnesses are gone, and I have no way of meeting that. This is not the proper time to go into that question.

Objection overruled.

Mr. Black: I may wish to take evidence out of court to meet evidence of this kind.

The Court: As to this point, certainly.

HERBERT VERNON SAUNDERS, recalled for claim- 421
ants, testifies:

By Mr. Kirlin:

Q. Have you ever been in the peak-tank of the *Carib Prince?* A. I have.

Q. Are there any fore-and-aft strengthening beams inside of the tank? A. Not strengthening beams; the tank is strengthened with stringer plates which run from the stem to the bulkhead; there are three rows. Beside the deck that tank is again supported by what we call panting-beams; they go from side to side.

Q. Crosswise? A. Yes, below the between-decks.

Q. You said there was three rows of these beams? 422
A. Three rows of these stringers fore-and-aft; they connect at the stem and run to the bulkhead one above the other.

Q. How many beams are there fore-and-aft? A. No beams fore-and-aft. These stringers run fore-and-aft.

Q. How many stringers are there? A. Three leading from the bow to the bulkhead.

Q. To the middle of the bulkhead? A. No, not to the middle of the bulkhead. They run along the side of the ship.

Q. In the open space at the tank itself? A. They are connected with the side of the ship and on to the bulkhead. They are not formed like that (re- 423
ferring to Exhibit 4); that is entirely wrong. The strain on that and on a stringer plate would be entirely different.

Q. There are three altogether? A. Three on each side. The tank is strengthened this way: First the floors, then the panting-beams, then the orlop-beams and then the deck or top of the tank.

Q. Are the panting-beams fastened on to the bulkhead at all? A. The panting-beams are fastened on the ship's side.

424 Q. Are there any fastenings which lead to the bulkhead? A. No.

Q. Have the stringers? A. The stringers are fastened on the bulkhead.

Q. How far from the side of the ship? A. The stringers are about 2 feet 6 wide.

CROSS-EXAMINED by Counsel for Libellant.

By Mr. Black:

Q. You mean by stringers horizontal plates running along the side of the ship parallel with the line of the keel? A. Parallel with the line of the keel.

Q. You say that on each side there are three such
425 stringers in the fore tank? A. Three.

Q. How far apart in vertical height are those stringers? A. About four to five feet.

Q. How wide, running horizontally from the side of the ship are those stringers? A. About two feet and a half.

Q. And those stringers run until they butt up against the bulkhead? A. They butt up against the bulkhead.

Q. And are attached to the bulkhead by angle irons? A. And are attached to the bulkhead by one angle-iron.

Q. Each one? A. Each one.

Q. A single angle-iron on top of the stringer? A.
426 A single angle-iron on top of the stringer.

Q. At the square formed by the bulkhead coming against the stringer is there a gusset-plate or knee-tie? A. Not that I am aware of.

Q. So the stringer operates as a stringer would if it were there, doesn't it? A. It does.

Mr. Kirlin here sums up the case for the *Carib Prince*.

Claimant's Exhibit No. 3. 427

TRINIDAD LINE.

AGENTS:

GEORGE CHRISTALL & Co., New York.
TURNBULL, STEWART & Co., Trinidad.
GREGOR TURNBULL & Co., Glasgow.
WADE & ABBOTT, St. Kitts.
GEO. W. BENNETT & Co., Antigua.
JNO. MCCALL & Co., Tobago.
THOS. DANIELS & Co., Ltd., Barbados.
WM. MACINTYRE, Dominica.
MARTIN DEAN & Co., Grenada. 428
E. BRUMANT & A. BEAUPERTHAY & Co., Gaudeloupe.
T. BLAISEMONTE, Martinique.
MINVIELLE & CHASTANET, St. Lucia.
GEO. H. IRISH, Montserrat.

A. M. & C	250	cases
P & T	250	"
	500	"

SHIPPED, in good order and well-conditioned, by Dr. T. G. B. Siegert & Sons on board the screw steamer *Carib Prince*, whereof E. C. Legg is Commander, now lying in Gulf of Paria and bound to 429 New York, U. S. A., with liberty to sail with or without Pilots, to tow or assist Vessels in all situations, or to be towed, and to call for any and all purposes at any Port or Ports without being deemed a deviation.

500 Cases Angostura Bitters

being marked and numbered as per margin: to be delivered from the Ship's deck, where the Ship's responsibility shall cease, in the like good order and

well conditioned, at the aforesaid Port of New York. The Act of God, the Queen's enemies, Pirates, Robbers, Restraints of Princes, Rulers and People, Loss or Damage from Heat or Fire on board, in hulk or craft or on shore, Explosion, Steam, Accidents to or latent defects in Hull, Tackle, Boilers and Machinery, or their appurtenances, Jettison, Barratry, any act, neglect or default whatsoever, of Pilots, Masters or Crew in the management or navigation of the Ship, Quarantine, Collision, Stranding, and all and every other Dangers and Accidents of the Seas, Rivers or Steam Navigation, or whatever nature or kind always excepted. In the event of the Steamer putting back or into Port, or otherwise being prevented, from any cause, from proceeding in the ordinary course of her voyage, the Master or Agent to have liberty to tranship the Goods by any other Steamer or Steamers. Average (if any) according to York Antwerp rules.

Weight, Measure, Quality, Contents, and Value unknown, and not accountable for inaccurate description of Goods shipped, for Leakage, Breakage or insufficiency in packing, or in strength of package, obliterations, or inaccuracies of Marks, Numbers, designation or Address on the Packages, nor for damage or loss from vermin, sweating, decay, heat of holds, contact with, or smell or evaporation from other goods; nor for any consequences arising from any of the foregoing exceptions. If goods, other than usual Island produce, or of a dangerous and damaging nature, be shipped without being previously declared and arranged for, all loss, damage, or responsibility whatever connected, with said goods will fall upon the Merchants or Owners of said goods.

unto J. W. Wuppermann, Esq., or to his or their Assigns Freight and charges to be paid by Consignee in American Gold, or equivalent with average accustomed, at the rate of 20c. per case in full.

The Collector of the Port is hereby authorized to grant a general order for the discharge immediately after the entry of the Ship. The goods to be received by the Consignee as fast as the steamer can deliver, and any extra charges incurred after being discharged, necessary for the Steamer's quick dispatch, to be paid by the Owner or Consignee of the goods. Sugar drainage for account of ship. 433

The Master or agent shall have a lien on the goods for Freight unpaid, payments made or liabilities incurred in respect of any charges stipulated herein to be borne by the Owner of the said goods.

In witness whereof, the Master or Agent of the said Vessel hath affirmed to 4 Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void. 434

Dated at Trinidad this 31st day of August, 1893.

p.p. Turnbull, Stewart & Co.
George Christall.

It is agreed that the other bills of lading put in evidence by other libellants and by claimant be omitted, the form thereof and terms and conditions thereof being the same as the above and the cargo being that mentioned in the several libels, with liberty to refer to the above for the terms and conditions of the others with the same force and effect as though all were fully set forth in this and the other cases. 435

Convers & Kirlin,
Procs. for Clt.
Geo. A. Black,
Proc. for Libts.

436 **Claimants' Exhibit A.**

W. W. Hurlbut & Co.,
136 Pearl Street,
New York.

Cable Address,
"Dogbastian."
Watkins Code,
Scotts Code.

Telephone "John 142."

TIME CHARTER.

NEW YORK, Sept. 14, 1892.

IT IS THIS DAY MUTUALLY AGREED, between W. W. Hurlbut & Co., Agents for James Knott, Esq.,
437 owner of the two good screw steamships to be built and named by charterers of the port of of tons gross register, and tons net register horses power, provided with steam winches, spare propeller, spare crank, and spare tail shaft and Board of Trade certificates for hull and machinery; classed 100 A1, and U. S. Certificate for 30 first class cabin passengers, and George Christall, Esq., of the Trinidad Direct Line S. S. Co., charterer, as follows, viz.:

1. The said owner agrees and the said charterer agree to hire the said steamships for the term of forty-eight calendar months (or, in charterers option,
438 until the completion of any voyage commenced at any time before but not completed until after the expiry of the said 48 months) commencing on after entry at C. H. and ready to receive cargo, they then being placed at the disposal of the charterers, in their loading berth, in the port of New York, at such wharf or place (where she may always safely lie afloat) as the charterers may direct, they being then tight, staunch, strong, bottoms newly painted, and every way fitted for the service; to be employed in any lawful trades between the United Kingdom

and/or of the Continent of Europe and/or Africa and/or Asia and/or Central America and/or North and/or South America and/or West Indies, (not north of River St. Lawrence) in any order, or in any other trade, as the charterers or their agents shall direct. Baltic ports and River St. Lawrence excluded from Oct. first to May first. 439

2. The charterers shall provide and pay loading and discharging the cargo, and for all the provisions, consular fees and wages of the captains, officers, engineers, firemen, & crew who, excepting the engineers, shall be appointed by them. The owners shall appoint 3 engineers to each vessel, their pay not to exceed that paid by the owner in similar vessels. The owners shall maintain the vessels in a thoroughly efficient state in hull and machinery for the service, including winches with chain and/or wire gear and donkey boiler. Deck and engine room stores to be found by owner. 440

3. The charterers shall also provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, excepting for painting and repairs to hull and machinery, and anything appertaining to keeping the ships in proper working order.

4. The charterers shall pay for the use and hire of each of the said vessels at the rate of (£700 Br. Sterling) Seven hundred Pounds British Sterling, at the current rate of exchange of bankers, 60 day bills on London per calendar month, and at and after the same rate for any part of a month, the hire to continue from the time specified for terminating the charters until deliveries to the owner (unless lost), at port of in the United States—North of Hatteras. Payment whereof shall be made in cash at New York monthly in advance, and in default of such payment or payments as herein are 441

442 specified the owners shall have the right of withdrawing the said steamers from the service of the charterers, without prejudice to any claim the owners may otherwise have on the charterers in pursuance of this charter.

5. That the cargoes shall be laden and/or discharged in any dock, or at any wharf or place that charterers may direct where she can always safely lie afloat.

6. That the whole reach burthen and passenger accommodation of the ships (not being more than she can reasonably stow and carry) shall be at the charterers disposal, reserving only proper and suf-
443 ficient space for ships officers, crew, tackle, apparel, furniture, provisions and stores. Cargo and/or coals and/or cattle may be taken on deck at the charterers risk so far as the same do not endanger the safety of the vessel.

7. The expense of loading and discharging shall be borne by the charterers, the stowage shall be under the control of the master, and the charterers shall be responsible for the same. Ballast and dunnage as required shall be found by charterers.

8. A full outfit of plated ware, crockery, linen and
444 all other fittings shall be supplied by owners and inventory thereof taken at the commencement of this charter—all fair wear and tear of same shall be for owners account and the outfit shall be maintained by the owners in good condition throughout the charter. Charterers being responsible for all articles lost or broken except for the ordinary breakage of crockery incidental to all vessels.

9. The vessel shall be put into dry dock and painted, if required by charterers at owners ex-

pense every six months. Time so occupied shall not be paid for by charterers. 445

10. The master shall be under the orders and directions of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the master signing bills of lading, by their orders, or those of their agents, or in otherwise complying with same. The master although appointed by charterers to be satisfactory to the owners.

11. If the charterers shall have reason to be dissatisfied with the conduct of the engineers, or if the owners should have reason to be dissatisfied with the conduct of the officers or crew, a satisfactory change in the appointments shall be made when the steamer is in New York or Europe. 446

12. That the charterers shall have the option of continuing the charter for a further period of one year on giving one month's notice thereof to owners previous to expiration of first named term, and to have the liberty of sub letting the steamer, if required by them.

13. That should vessel be lost, any hire paid in advance and not earned (reckoning from the date of her loss) shall be returned to the charterers, with interest from date of loss. 447

14. * * * * * *

15. That should any dispute arise between the owners and the charterers, the matters in dispute shall be referred to three persons at New York, one to be appointed by each of the parties thereto, and the third by the two so chosen, their decision, or

any two of them shall be final, and for the purpose of enforcing any award, this agreement shall be made a rule of court.

16. That the owners shall have a lien upon all cargoes, and all sub-freight, for freight or charter money due under this charter, and the charterers to have a lien on the ship for all moneys paid in advance and not earned.

17. In the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owner preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she or they be again in an efficient state to resume her service; and if upon the voyage her speed be reduced by the breakdown of her machinery, the loss of the propeller, or any other mishap, the time so lost and the cost of the extra coal, (if any), consumed in consequence thereof, shall be deducted from the hire. Further, if in consequence of such deficiency, collision, want of repairs, breakdown or other causes, the vessel should put into any port or ports other than those to which she is bound, port charges, pilotages, and other expenses at those ports, and all those consequent upon the putting in, shall be borne by the owners; but should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers.

18. It is understood that the bills of lading used by the charterers shall contain the usual "negligence" clause.

19. The charterers shall pay the owners the current local price for any coals left in the steamer's

bunkers, and the owners in like manner shall pay 451
the charterers the current local price for any coals remaining on board on completion of the present charter.

20. United States passenger certificate for thirty passengers (first class) to be furnished by charterers. And passenger accommodation for thirty first class cabin passengers fitted in first class manner, with all napery, crockery, etc., usual for first class West Indian service. Owners to furnish the usual life-boats required for vessels this size and class, also to put steam pipes in holds of 2-inch diameter so hold could be flooded with steam in case of fire.

452

21. Charterers have the option of cancelling this charter if steamers are not ready to receive cargo by April 30, 1893.

The clause on back of this charter to form rest of contract.

22. That the owners shall pay for the insurance on the vessels.

23. The benefit of all derelicts and salvages, as well as the loss of time and other expenses attendant thereon, to be for account of owners and charterers equally. Penalty for non-performance of this contract, estimated damages.

453

24. An address commission of 2½ per cent on the amount of this charter is payable by owners to charterers agents, Messrs. Carey, Yale & Lambert, of New York.

25. Commission of 5 per cent on the estimated amount of freight is due and payable by owners, on assignment hereof to W. W. Hurlbut & Co., New

York, ship lost or not lost, as also on any extension or renewal of this charter or purchase of vessel.
By cable authority of James Knott, Esq.
Dated Newcastle-on-Tyne,
Sept. 14, 1893.

Signed by W. W. HURLBUT & Co. (sgd.).,
Agents.

In the presence of
A. C. COLVIL (sgd.).
Signed by GEORGE CHRISTALL (sgd.).
In the presence of
WM. S. LAMBERT (sgd.).

We certify the above to be a true copy of the original Charter Party in our possession.
W. W. HURLBUT & Co.,
Brokers.

26. It is understood and agreed that the two steamers are to be contracted for, so that delivery can be made at New York between March 1st and April 30, 1893. Charterers agree to accept the usual builders guarantee.

27. Owner guarantees steamers to steam not less than a steady 10 knots when loaded in ordinary weather on a consumption of 15 tons Welsh coal per 24 hours, provided good quality American or English coals are supplied. To be fitted with triple expansion engines of sufficient size to drive steamers required speed.

28. Two extra large boilers to be furnished each steamer to enable the steamers to maintain their speed in tropical waters. Donkey engines and boilers to be sufficiently large to drive all the winches at one and the same time, as well as to provide steam for heating cabins.

29. Both steamships to be guaranteed to carry not less than 2,500 tons dead weight all told and draft not to exceed 20 feet mean draft loaded. 457

30. Lower holds to be divided into four compartments, and to have four hatches as large as possible, with hatch covers to between decks. Each hatch to be provided with first class double winches capable of lifting five tons, with double derricks to each, to enable quick handling of cargo. Side ports to each ship.

31. To be provided with stockless anchors, first class steam windlass and stearing gear. Taffrail on upper deck to meet with Lloyds rules, and to unship abreast each hatch. 458

32. Electric lights to be provided for loading and discharging cargo as well as for cabins. Full set of plans and half models to be furnished charterers by owners.

33. Saloon, state-rooms, smoking and ladies room, chart-house, etc., to suit the trade, and in accordance with plans, cables, and letters exchanged. Owner to remember vessel is intended for tropical trades and state-rooms, etc. must be large, light and well ventilated, and also steam heated. Full outfit of napery, linen, silver, etc. to be furnished and charterer to be responsible for same if lost or broken, and return same on completion of charter in good order. Ordinary wear and tear excepted. Plans of ship and cabin to be subject to charterers approval. 459

34. No goods, contraband of war to be shipped, and the steamer not to be required to enter any port that is in a state of blockade, or where hostilities are in progress or imminent. In the event of a country to which steamer trades being at war with

460 any other country, charterers agree to insure the steamer against all war risks for the value under the present policy.

35. No injurious cargoes to be shipped, or any voyage undertaken, or goods or cargoes loaded that would involve risk, seizure, capture, or penalty, by British or Foreign rulers, or government. It is understood W. H. Bennett proceeds to Newcastle to approve final plans, in charterers interest, only approving plans in accordance with Mr. Christall's instructions, minor details, such as ice-house, store-rooms, specie-room, mail-locker, etc., to be arranged to mutual satisfaction of both charterer and owner.

461

(sgd.) W. W. HURLBUT & Co.
Agents.

(sgd.) GEORGE CHRISTALL.

Witnessed:

(sgd.) A. C. COLVIL.

(sgd.) WM. S. LAMBERT.

462

Exhibit A. 463

EXTRACTS FROM SPECIFICATION OF S. S. "CARIB PRINCE."

Produced by the witness M. C. James.

GENERAL DESCRIPTION.—The vessel to be built generally as per accompanying drawings, but all detail and working drawings are to be supplied by builders, and approved by owner. To have a clipper stem, elliptic stern, short poop, long bridge. Full topgallant forecastle. To be rigged as a two-masted schooner, with no yards on foremast. Water ballast in a cellular double bottom all fore and aft, and 464
in fore and aft peaks. To have instead of hold beams the main frames doubled, or large zed frames leaving holes clear for carrying large machinery or other cargo, but strong beams in engine-room, and panting beams and stringers in both peaks. Engine and boiler casing to stand feet and inches high. The vessel to be built of steel, except tank top, floors, intercostals, and any other parts liable to speedy corrosion, at owners option, other parts usually of iron in vessels built of steel to be iron. All steel used in the construction to be of Siemens-Martin process and tested by Lloyd's surveyors as required. To have a plate keel, and bilge keels of 10 x $\frac{1}{2}^0$ bulb, and 4 x $3\frac{1}{2}$ x $\frac{1}{2}^0$ angles on each side for about 95 feet 465
amidships. * * *

All workmanship and materials to be of the best description and to the satisfaction of owner. * * *

RIVETING.—To be riveted in accordance with Lloyd's rules, and carefully tested. Holes to be carefully spaced and accurately punched and very carefully countersunk. Care to be taken that the holes are completely filled by the rivets, and that the points, when closed up, are not below, but slightly above the surface of the plating. No rivets to come

466 through butts of plating. Rivets to be of iron of good quality, to owners approval. Rivets in keel, stem and stern frame to be raised at least ¼-inch above the surface of the plating. * * *

WATER TESTING.—All the water ballast compartments, including peaks, to be tested, being pressed with a head of water one foot above the height of the load water line, and made thoroughly water tight in best and most workmanlike manner. All decks to be flooded for testing. Sufficient notice to be given to the owner when any testing is to take place.

467

BULKHEADS.—To have steel water-tight bulkheads. Bulkhead plates in bunkers to be of iron. All to have horizontal and vertical stiffening angles of ample strength and the collision bulkhead to be additionally strengthened to owner's satisfaction, and boiler-room bulkhead to have water-tight doors at least 36 by 18 inches, fitted on each side for access to reserve bunker. Engine-room bulkhead to have a large water-tight door for access to shaft tunnel, with lifting screw wood cross bunker bulkhead in main hold and divisional bulkhead in after hold, to be fitted in positions as required, both to be well stayed with angle irons and made quite dust-tight and to have two dust-tight sliding doors. The
468 donkey-boiler recess and boiler-room bulkhead out to line of side bunkers to be sheathed with pine 2½ inches thick, leaving an air space of 9 inches between, and the air space to be efficiently ventilated to owner's satisfaction.

U. S. CIRCUIT COURT OF APPEALS. 469

WILLIAM GILLESPIE *et al.*

vs.

S.S. "CARIB PRINCE," and three other cases.

It is stipulated that the annexed three pages of the chief officer's log and the annexed three pages of the chief engineer's log of the steamship *Carib Prince* may be returned on the appeal herein, and that either party may on the argument of this case read any other pages from said logs. 470

Dated January 26, 1895.

CONVERS & KIRLIN,
Procs. for Clt.
GEO. A. BLACK,
Proc. for Libts.

471

PREVIOUS FOLDOUTS TOO

472 UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

JOSEPHINE W. WUPPERMANN

vs.

The Steamship "CARIB PRINCE."

CLIFFORD L. MIDDLETON *et al.*

473 vs.

THE SAME.

MANUEL CADENAS and another

vs.

THE SAME.

474 WILLIAM GILLESPIE *et al.*

vs.

THE SAME.

Opinion.

OCTOBER 4, 1894.

BENEDICT, *J.*—These actions are brought to recover of the steamship *Carib Prince* for damage done

to merchandise forming the cargo of that vessel on a voyage from Grenada to New York. 475

The vessel was constructed with a water tank of iron in her peak, one side of which was formed by a bulkhead. This tank, when she sailed from Grenada, was empty, but, during the voyage from Grenada to New York, it was filled with water one afternoon, in order to trim the vessel, and the next morning, much of the water having gone from the tank, an investigation showed that the head had come off from one of the rivets riveting the bulkhead side of the tank, leaving a hole through which water had poured upon the libellants' merchandise stowed near the bulkhead. The evidence in respect to the rivet has led me to the conclusion that the cause of 476 the accident was a defect in the rivet, arising from the fact that the quality of the iron had been injured by too much hammering at the time it was annealing, so that it became brittle and weak. This defect could not be seen. The broken rivet was found on one of the bags of cargo, and showed that it had broken off in the countersunk part of the rivet, below the head, so that while the rivet remained in place no external examination would have discovered the defect.

This defective rivet was in my opinion the cause of the accident. The condition of the rivet rendered it unfit to sustain the reasonable pressure caused by filling the tank with water while at sea, 477 and the vessel consequently was unseaworthy in that respect. The evidence shows that the vessel was a new vessel, built by builders of the highest class, and all reasonable effort was made to secure a proper riveting of the tank. After construction the tank was tested by a hammer and by water pressure, and it was found to be tight and strong enough to sustain the weight of water while not in motion. When the tank was filled with water while the ship was in motion, the rivet in question proved insufficient, owing, as already stated, to the fact that the iron had lost its strength in the process of being ham-

478 mered while it was annealing, and it gave way, causing the damage sued for.

If diligence on the part of the shipowner to provide a seaworthy ship, and a justifiable belief on his part that his ship was seaworthy, could avail to relieve him from his warranty of seaworthiness, he could be relieved upon the proofs in this case; but the rule has been declared that if the unseaworthy condition arose from a defective construction, although latent and unknown to the owner, he is not excused. The shipowner must show affirmatively that his ship was seaworthy at the beginning of the voyage.

The question then arises whether this obligation
479 on the part of a shipowner has been qualified by the clause in the bill of lading which exempts the shipowner from damage caused by a latent defect —which is this case. This was an English ship, the contract was signed in a port governed by English law, and it has been held in this circuit that such a case is to be governed by the law of the place where the contract was made. It was a British vessel, governed by the laws of England.

Liverpool and Great West. Steamship Co. *vs.* Phenix Ins. Co., 129 U. S., 397; *The Majestic*, 60 Fed. Rep., 624; App., 282-295.

480 The law of England as declared in the case of The Cargo *ex Lartes*, 12 Prob. Div., 187, is to the effect that by the laws of England such an exception as that contained in the bill of lading sued on, if it does not abrogate, at all events limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the shipowner. Applying that law to this case, it follows from the fact that the weak condition of the iron rivet could not be discovered by the exercise of due diligence, that the ship cannot be held liable for the injury to the libellants' cargo, because the danger

arose from a latent defect in the rivet which gave 481
way, within the exception in the bill of lading under which the merchandise was carried.

Upon this ground the libels are dismissed, and with costs.

At a Stated Term of the United States District Court for the Eastern District of New York, held in the Post Office Building, in the City of Brooklyn, on the 11th day of October, 1894.

Present—Hon. CHARLES L. BENEDICT,
District Judge.

482

JOSEPHINE W. WUPPERMANN,
Libellant,

AGAINST

The Steamship "CARIB PRINCE," Ernest C. Legge,
Claimant.

The above entitled cause having come on to be heard, on the pleadings and proofs of the respective parties, and after hearing the advocates of the respective parties, and due deliberation having been 483
had, now, on motion of Convers & Kirlin, proctors for the claimant, it is

Ordered, adjudged and decreed, that the libel in this cause be and the same hereby is dismissed, with costs; and the costs of the claimant having been taxed at the sum of $93.21, it is further

Ordered, adjudged and decreed, that the claimant Ernest C. Legge recover in this action against the libellant above named, Josephine W. Wuppermann, the sum of $93.21; and it is further

Ordered, adjudged and decreed, that unless an appeal be taken from this decree within the time

allowed by law and the rules and practice of this Court, the Clerk of this Court pay to the claimants or their proctors the said sum of ninety-three and $\frac{21}{100}$ dollars out of the amount deposited in the registry of this Court by the libellant as security for costs, and the remainder of said sum be paid to the libellant or her proctors, less the fees for keeping and paying out the whole of said sum. And after the payment of said sum, all stipulations given herein by the claimant to be cancelled of record.

CHAS. L. BENEDICT.

(Endorsed)—Final Decree.—Filed and entered the 11th day of October, 1894.

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK.

JOSEPHINE W. WUPPERMANN

vs.

S. S. "CARIB PRINCE," her engines, &c.

Please take notice that the libellant herein appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered herein on the 11th day of October, 1894.

Dated October 19, 1894.

GEO. A. BLACK,
Proctor for Libellant.

To Messrs. CONVERS & KIRLIN,
Claimant's Proctors.

B. LINCOLN BENEDICT, Esq.,
Clerk.

(Endorsed)—Notice of Appeal.—Filed October 20, 1894.

U. S. DISTRICT COURT, 487

EASTERN DISTRICT OF NEW YORK.

JOSEPHINE W. WUPPERMANN
vs.
S. S. "CARIB PRINCE."

ASSIGNMENT OF ERRORS BY LIBELLANT-APPELLANT.

488

FIRST.—The District Court erred in holding that the steamship *Carib Prince* was not liable to the libellant for the damage to her cargo alleged in the libel.

SECOND.—The District Court erred in holding that the exception of latent defects in the bill of lading exempted the steamship from liability to the libellant.

THIRD.—The District Court erred in not holding that the steamship *Carib Prince* was unseaworthy at the time she sailed with the cargo on board, of libellant, and that such unseaworthiness caused the injury to libellant's cargo. 489

FOURTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect to the construction of her ballast tank, which caused the injury to libellant's cargo.

FIFTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect to the construction of her floor over her bilges, which caused the injury to the libellant's cargo.

490 SIXTH.—That the said District Court erred in dismissing the libel, and should have awarded a decree in favor of libellant for the damages sustained to her cargo.

GEO. A. BLACK,
Proctor for Libellant,
44 Pine Street,
New York City.

(Endorsed)—Assignment of Errors by Libellant-Appellant.—Filed October 22, 1894.

UNITED STATES OF AMERICA, }
Eastern District of New York, } ss.:

491 I, B. LINCOLN BENEDICT, Clerk of the United States District Court for the Eastern District of New York, do hereby certify that the foregoing is a true transcript of the pleadings, proofs and papers on appeal on file in my office in the suit of Josephine W. Wuppermann against The Steamship *Carib Prince*, her engines, &c., made up to be transmitted to the United States Circuit Court of Appeals for the Second Circuit, pursuant to rule.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Brooklyn, this 31st day of January, 1895.

B. LINCOLN BENEDICT,
Clerk.

[SEAL.]

492

UNITED STATES DISTRICT COURT, 493

EASTERN DISTRICT OF NEW YORK.

MANUEL CADENAS and EDWARD P. COE,
Libellants,

AGAINST

The Steamship "CARIB PRINCE," her engines, &c. JAMES KNOTT,
Claimant.

494

STATEMENT.

1893, Oct. 23. Libel filed. No process issued.
" 26. Claim filed by James Knott, owner, with stipulation for value.
Nov. 27. Answer filed.
" " Exceptions to answer filed.
1894, Jany. 8. Amended answer filed.
" 11. Exceptions to amended answer filed.
Feby. 9. Order on exceptions entered.
" 19. Amendments to answer filed.
June 14 and 18. Cause tried before Hon. Charles L. Benedict, Judge. 495
Oct. 4. Decision rendered.
" 11. Final decree entered.
" 20. Notice of appeal and assignment of errors filed.

496 To the Honorable CHARLES L. BENEDICT, Judge of the District Court of the United States for the Eastern District of New York:

The libel and complaint of Manuel Cadenas and Edward P. Coe against the steamship *Carib Prince*, her engines, &c., in a cause of contract, civil and maritime, alleges and articulately propounds as follows:

I.—That your libellants, at all the times hereinafter mentioned, were copartners in business, under the firm name of Cadenas & Coe, in the City of New York, and carry on business therein.

II.—That on or about the 1st day of September,
497 1893, there was shipped upon the steamship *Carib Prince*, then lying at Trinidad, and bound for the port of New York, and engaged in carrying on the business of a common carrier, by J. Anduze & Co., 43 bags of cocoa, the property of your libellants, to be carried to the port of New York, and there delivered unto your libellants in the like good order as received for a freight agreed to be paid therefor, and the agents of said steamship signed bills of lading therefor, dated the 1st day of September, 1893, whereby they acknowledged the receipt of the said 43 bags of cocoa in good order and well conditioned, and undertook to deliver the same at the port of New York in the like good order.

498 III.—That the said first day of September, 1893, there was also shipped upon the steamship *Carib Prince*, then lying at Trinidad as aforesaid, and bound for the port of New York, by the firm of Andre Giusseppi & Co , 25 bags of cocoa, the property of your libellants, to be carried to the port of New York, and there delivered unto your libellants in the like good order as received for a freight agreed to be paid therefor, and the agents of said steamship signed the bills of lading therefor, dated the 1st of September, 1893, whereby they acknowledged the receipt of the said 25 bags of

cocoa in good order and well conditioned, and under- 499
took to deliver the same at the port of New York in the like good order.

IV.—That thereafter and on or about the 11th day of September, 1893, the said steamship *Carib Prince* arrived at the port of New York and there delivered to the libellants the said 68 bags of cocoa, but not in the like good order as received, 52 of said bags, to wit, 19 bearing the mark "A G & C / C C" and 23 bearing the mark "Loisa" and 10 bearing the mark "Magdelena" being damaged, and that your libellants have suffered damage thereto in the sum of $861.92, payment of which has been demanded of the agents of said steamship and refused. 500

V.—That the said steamship *Carib Prince* is now in the port of New York and within the jurisdiction of this Honorable Court.

VI.—That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libellants pray that process in due form of law issue against said steamship, her tackle, &c., and that all persons interested therein may be cited to appear and answer all and singular the matters afo[illegible]id, and that the said steamship may be condemned and sold to pay the said damages, to your libellants, with interest and costs, and that otherwise right and justice may be done. 501

MANUEL CADENAS.

Sworn to before me this 21st day of October, 1893.

LAWRENCE KNEELAND,
[L. S.] Notary Public,
Kings Co.
Cert. filed in N. Y. Co.

GEO. A. BLACK,
Proctor for Libellants,
44 Pine street,
New York City.

(Endorsed)—Libel.—Filed October 23, 1893.

502 To the Honorable CHARLES L. BENEDICT, United States District Judge, for the Eastern District of New York.

The amended answer of James Knott, owner and claimant of the steamship *Carib Prince*, to the libel of Manuel Cadenas and Edward P. Coe, against said steamship, her engines, &c., in a cause of contract, civil and maritime, alleges and propounds as follows:

FIRST.—He admits the matters alleged in the first article of the libel.

503 SECOND.—He admits that on or about the 1st day of September, 1893, there were shipped upon the steamship *Carib Prince*, then lying at Trinidad, and bound for the port of New York, by J. Anduze & Co., 43 bags of cocoa, the property of the libellants, to be carried to the port of New York, and there delivered unto the libellants in the like good order as received, subject to the conditions and exceptions contained in the contract of carriage. But he denies that the steamship at the time in question was engaged in carrying on the business of a common carrier, and explains that the vessel was let out to hire to George Christall, Esq., of the Trinidad Direct Line Steamship Company, as hereinafter set forth. He denies that the agents of said ship signed
504 bills of lading for the merchandise in question, dated the 1st day of September, 1893, but admits that the agents of George Christall, Esq , of the Trinidad Direct Line Steamship Company, signed bills of lading therefor, whereby they acknowledged receipt of the said forty-three bags of cocoa in apparent good order and condition, and undertook to deliver the same at the port of New York in the like apparent good order, subject to the terms, conditions and exceptions contained in the bill of lading, a copy of which is hereto annexed, marked Schedule "A," and made a part thereof.

THIRD.—He admits that on or about the 1st day 505
of September, 1893, there were shipped upon the steamship *Carib Prince*, then lying at Trinidad, and bound for the port of New York, by Andre Giusseppi & Co., twenty-five bags of cocoa, the property of the libellants, to be carried to the port of New York, and there delivered unto the libellants in the like good order as received, subject to the conditions and exceptions contained in the contract of carriage. But he denies that the steamship at the time in question was engaged in carrying on the business of a common carrier, and explains that the vessel was let out to hire to George Christall, Esq., of the Trinidad Direct Line Steamship Company, as hereinafter set forth. He denies that the agents of said 506
steamship signed bills of lading for the merchandise in question, dated the 1st day of September, 1893, but admits that the agents of George Christall, Esq., of the Trinidad Direct Line Steamship Company, signed bills of lading therefor, whereby they acknowledged receipt of the said twenty-five bags of cocoa in apparent good order and condition, and undertook to deliver the same at the port of New York in the like apparent good order, subject to the terms, conditions and exceptions contained in the bills of lading, which were the same as those contained in Schedule "A" hereto annexed. (Being in same form as Wuppermann Bill of Lading, it is omitted herefrom by consent, with liberty to refer to that 507
bill for form and terms with like effect as though here printed.)

FOURTH.—He admits that afterwards and on or about the 11th day of September, 1893, the steamship *Carib Prince* arrived at the port of New York, and admits that the agents of the said George Christall, Esq., of the Trinidad Direct Line Steamship Company, thereupon delivered from the steamship to the libellants all of the said bags of cocoa, some of which had been, during the voyage, damaged by sea water which entered the hold, owing to latent

508 defects in the bulkhead between the No. 1 hold, in which the cargo was stowed, and the peak tank, just forward of it, or through some fault or error on the part of those in charge of said steamship in the management or navigation of the vessel during the voyage, in filling the said peak tank, for which, under the terms of the bills of lading, it was agreed the ship should not be responsible, and he denies any knowledge or information sufficient to form a belief in relation to the number of packages damaged, their marks, or the extent of the injury.

He furthermore denies that the amount of said damage has been demanded of the agents of said steamship and refused.

509

FIFTH.—He admits the matters contained in the fifth article of the libel.

SIXTH.—Except as hereinbefore and hereinafter admitted, he denies the matters contained in the sixth article of the libel.

SEVENTH.—For a further and separate defense, claimant alleges that at all the times in question, the steamship *Carib Prince* was let out to hire under a charter of demise unto George Christall, Esq., of the Trinidad Direct Line Steamship Company, who manned and officered the vessel, and
510 whose agents made all freighting contracts, and signed and delivered all bills of lading. A copy of said charter-party is hereto annexed (being the same offered in evidence on trial and printed in the Wuppermann Apostles and omitted herefrom by consent, with liberty to refer to charter in evidence with like effect as though here printed) marked Schedule "B" and made a part hereof. The merchandise in question was carried under bills of lading signed by the agents of the charterer at Trinidad. Claimant thereupon alleges that said bills of lading are personal contracts between the shippers and charterer

of the vessel, and do not bind the steamship *Carib* 511
Prince in rem as a common carrier.

EIGHTH.—In the alternative, he alleges that said bills of lading provided that the merchandise in question was "to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and well conditioned, at the aforesaid port of New York; the act of God * * * loss or damage from heat or fire on board, in hulk or craft or on shore, explosion, steam, accidents to or latent defects in hull, tackle, boilers and machinery, or their appurtenances, jettison, barratry, any act, neglect or default whatsoever, of pilots, masters or crew in the management or navigation of 512
the ship * * * and all and every other dangers and accidents of the seas, rivers, or steam navigation, of whatever nature or kind always excepted. * * * Weight, measure, quality, contents and value unknown, and not accountable for inaccurate description of goods shipped, for leakage, breakage, or insufficiency in packing, or in strength of package, obliteration of, or inaccuracies of marks, numbers, designation, or address on the packages, nor for damage or loss from vermin, sweating, decay, heat of holds, contact with, or smell or evaporation from other goods; nor for any consequences arising from any of the foregoing exceptions."

The owner and charterer of said vessel used all 513
due diligence to have her properly equipped, manned, provisioned and outfitted, and to make her seaworthy and capable of performing her intended voyage, and used all due diligence in and about the transportation of the merchandise in question, and allege that the damage in question was due to latent defects in the bulkhead between the No. 1 hold and the peak tank, just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage, as will more fully appear on the trial of this cause.

514 The claimant further alleges that each and all of the above mentioned exemptions in the bill of lading are valid by the law of England, which prevails at the port of shipment where the contracts in question were made.

NINTH.—All and singular the premises in this amended answer contained are true.

Wherefore, claimant prays that the libel may be dismissed, with costs, and that the Court will make such decree as the justice of the cause may require.

CONVERS & KIRLIN,
Proctors for Claimant.

515

Southern District of New York, ss.:

J. PARKER KIRLIN, being duly sworn, says: That he is one of the proctors for the claimant herein, and that the foregoing amended answer is true, according to his information and belief, derived from statements made by the officers of said steamship. He further says that the claimant is absent from the United States.

J. P. KIRLIN.

Sworn to before me this 6th day of January, 1894.

CHARLES A. BRODEK,
[L. S.] Notary Public,
516 New York County.

At a Stated Term of the District Court of 517
the United States for the Eastern District of New York, held at the Court Rooms thereof in the Post Office Building, in the City of Brooklyn, on the 9th day of February, 1894.

Present—Hon. CHARLES L. BENEDICT,
District Judge.

MANUEL CADENAS *et al.*

AGAINST 518

S. S. "CARIB PRINCE."

The libellants, having filed eight exceptions to the amended answer of the claimants herein, and such exceptions having been noticed for argument by the said claimants, after hearing George A. Black, of counsel for the libellants, and J. Parker Kirlin, of counsel for the claimants, it is

Ordered, claimants not opposing, that the first and second of said exceptions be allowed, and that there be stricken from the second and third articles of the said amended answer the words therein, 519
"and he denies that the steamship at the time in question was engaged in carrying on the business of a common carrier."

(2.) That the third exception of the libellant to the fourth article of the amended answer is sustained as to the indefiniteness of the specification of what the latent defect was, and it is ordered, the claimants assenting thereto, that the said eighth article be amended by inserting in the said eighth

520 article of their amended answer the words "in certain rivets, angle irons, braces and straps" after the words "latent defects," and before the words "in the bulkhead" in said eighth article, and that in other respects the said sixth exception is overruled.

(3.) That the fourth exception of the libellants to the fourth article of the amended answer is overruled.

(4.) That the fifth exception to the seventh article of the amended answer as insufficient to constitute a defense is sustained.

521 (5.) That the sixth exception to the eighth article of the amended answer is sustained as to the indefiniteness of the specifications of what the latent defect was, and it is ordered, the claimants assenting thereto, that the said eighth article be amended by inserting in the said eighth article of their amended answer the words "in certain rivets, angle irons, braces and straps" after the words "latent defects" and before the words "in the bulkhead" in said eighth article, and that in other respects the said sixth exception is overruled.

(6.) That the seventh exception to the eighth article of the amended answer be overruled.

522 (7.) That the eighth exception to the eighth article of the amended answer be everruled.

(8.) It is further ordered that the claimants amend their answer in conformity thereto within 10 days after service of a copy of this order.

CHAS. L. BENEDICT.

(Endorsed)—Order.—Filed and entered Feby. 9, 1894.

UNITED STATES DISTRICT COURT. 523

EASTERN DISTRICT OF NEW YORK.

MANUEL CADENAS,
Libellant,

AGAINST

The Steamship "CARIB PRINCE,"
James Knott,
Claimant.

524

Pursuant to the order of this Court made and entered on the 9th day of February, 1894, the claimant amends his answer herein as follows:

1. Amend the second article of the amended answer by striking out the words "and he denies that the steamship at the time in question was engaged in carrying on the business of a common carrier."

2. Amend the third article of the amended answer by striking out the words "and he denies that the steamship at the time in question was engaged in carrying on the business of a common 525 carrier."

3. Amend the fourth article of the amended answer by inserting after the words "latent defects," and before the words "in the bulkhead," the words "in certain rivets, angle irons, braces and straps."

4. Strike out the seventh article of the amended answer.

526 5. Amend the eighth article of the amended answer by inserting after the words "latent defects," and before the words "in the bulkhead," the words "in certain rivets, angle irons, braces and straps."

CONVERS & KIRLIN,
Proctors for Claimant.

(Endorsed)—Amendments to Answer.—Filed February 19, 1894.

UNITED STATES CIRCUIT COURT,

527 EASTERN DISTRICT OF NEW YORK.

MANUEL CADENAS *et al.*

vs.

S.S. "CARIB PRINCE."

The testimony and exhibits adduced upon the trial of this Court and the opinion of the District Judge having been included in the record certified
528 by the Clerk in the suit of Josephine W. Wuppermann against the steamship *Carib Prince*, we hereby stipulate that the same may be omitted upon the record certified in this cause.

November 7, 1894.

CONVERS & KIRLIN,
Proctors for Liblt.

GEORGE A. BLACK,
Liblts.' Proctor.

At a Stated Term of the United States District Court for the Eastern District of New York, held in the Post Office Building, in the City of Brooklyn, on the 11th day of October, 1894. 529

Present—Hon. CHARLES L. BENEDICT,
District Judge.

MANUEL CADENAS *et al.*,
Libellants,

AGAINST

The Steamship "CARIB PRINCE,"
James Knott, Claimant. 530

The above entitled cause having come on to be heard, on the pleadings and proofs of the respective parties, and after hearing the advocates of the respective parties, and due deliberation having been had; now, on motion of Convers & Kirlin, proctors for the claimant, it is

Ordered, adjudged and decreed, that the libel in this cause be and the same hereby is dismissed, with costs; and the costs of the claimant having been taxed at the sum of $77.99, it is further 531

Ordered, adjudged and decreed, that the claimant, James Knott, recover in this action against the libellants above named, Manuel Cadenas and Edward P. Coe, the sum of $77.99; and it is further

Ordered, adjudged and decreed, that unless an appeal be taken from this decree within the time allowed by law and the rules and practice of this Court, the stipulators for costs on the part of the libellants cause the undertaking of their stipulation to be performed, or show cause, within four days thereafter, why execution should not issue against

532 them, their goods, chattels, credits and lands, to enforce a satisfaction of this decree; and it is further

Ordered, that unless the libellants appeal from this decree within ten days, all stipulations given herein by the claimant be cancelled of record.

CHAS. L. BENEDICT.

(Endorsed)—Final decree.—Filed and entered the 11th day of October, 1894.

DISTRICT COURT OF THE UNITED STATES

533 FOR THE EASTERN DISTRICT OF NEW YORK.

MANUEL CADENAS *et al.*

vs.

S. S. "CARIB PRINCE," her engines, &c.

Please take notice that the libellants herein appeal to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered
534 herein on the 11th day of October, 1894.

Dated October 19, 1894.

GEO. A. BLACK,
Proctor for Libellants.

To Messrs. CONVERS & KIRLIN,
Claimant's Proctors.
B. LINCOLN BENEDICT, Esq.,
Clerk.

(Endorsed)—Notice of Appeal.—Filed October 20, 1894.

U. S. DISTRICT COURT, 535

EASTERN DISTRICT OF NEW YORK.

MANUEL CADENAS *et al.*

vs.

The S. S. "CARIB PRINBE."

ASSIGNMENT OF ERRORS BY LIBELLANTS-APPELLANTS. 536

FIRST.—The District Court erred in holding that the steamship *Carib Prince* was not liable to the libellants for the damage to their cargo alleged in the libel.

SECOND.—The District Court erred in holding that the exception of latent defects in the bill of lading exempted the steamship from liability to the libellants.

THIRD.—The District Court erred in not holding that the steamship *Carib Prince* was unseaworthy at the time she sailed with the cargo on board of libellants and that such unseaworthiness caused the injury to libellants' cargo. 537

FOURTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect to the construction of her ballast tank, which caused the injury to libellants' cargo.

FIFTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect to the construction of her floor over her bilges, which caused the injury to the libellants' cargo.

538 SIXTH.—That the said District Court erred in dismissing the libel and should have awarded a decree in favor of libellants for the damages sustained to their cargo.

GEO. A. BLACK,
Proctor for Libellants,
44 Pine Street,
New York City.

(Endorsed)—Assignment of Errors by Libellants-Appellants.—Filed October 20, 1894.

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539 UNITED STATES OF AMERICA, }
Eastern District of New York, } ss.:

I, B. LINCOLN BENEDICT, Clerk of the United States District Court for the Eastern District of New York, do hereby certify that the foregoing is a true transcript of the pleadings, proofs and papers on appeal, on file in my office, in the suit of Manuel Cadenas and another against the steamship *Carib Prince*, her engines, &c., James Knott, claimant, made up to be transmitted to the United States Circuit Court of Appeals for the Second Circuit, pursuant to rule.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of
540 Brooklyn, this 15th day of November, 1894.

B. LINCOLN BENEDICT,
[SEAL.] Clerk.

UNITED STATES DISTRICT COURT, 541

EASTERN DISTRICT OF NEW YORK.

CLIFFORD L. MIDDLETON and DONALD S. L. LEE

vs.

The Steamship "CARIB PRINCE," her engines, &c., JAMES KNOTT,

Claimant. 542

STATEMENT.

1893. Oct. 30. Libel filed. No process issued.
Nov. 2. Claim filed by James Knott, owner. Stipulation for value filed.
1894. March 13. Answer filed.
June 14 and 18. Cause tried before Honorable Charles L. Benedict, Judge.
Oct. 4. Decision rendered.
" 11. Final decree entered.
" 20. Notice of Appeal and assignment of errors filed. 543

544 To the Honorable CHARLES L. BENEDICT, Judge of the District Court of the United States for the Eastern District of New York:

The libel and complaint of Clifford L. Middleton and Donald S. L. Lee against the steamship *Carib Prince*, her engines, boilers, &c., in a cause of contract, civil and maritime, alleges and articulately propounds as follows:

FIRST.—That your libellants are copartners in business in the City of New York, under the firm name of Middleton & Co.

545 SECOND.—That on or about the first of September, 1893, there was shipped upon the steamship *Carib Prince*, then lying in the Gulf of Paria, and bound for the port of New York, and engaged in business as a common carrier, by Gordon Grant & Co., 136 bags of cocoa, to be carried to the port of New York, and there delivered to your libellants in the like good order as received, for a freight agreed to be paid therefor, and that thereupon the agents of said steamship signed bills of lading therefor, whereby they acknowledged the receipt of said 138 bags of cocoa in good order and well conditioned, and undertook to deliver the same to your libellants at the port of New York in the like good order.

546 THIRD.—That thereafter and on or about the 10th day of September, 1893, the said steamship *Carib Prince* arrived at the port of New York, and delivered to libellants the said 138 bags of cocoa, but not in the like good order as received, 115 bags thereof being delivered in a damaged condition, and that thereby the owner of said property sustained damage in the sum of $2,015.67.

FOURTH.—That the said steamship *Carib Prince* is now in the port of New York, and within the jurisdiction of this Honorable Court.

FIFTH.—That all and singular the premises are 547
true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libellants pray that process in due form of law issue against said steamship, her engines, boilers, &c., and that all persons interested therein may be cited to appear and answer all and singular the matters aforesaid, and that the said steamship may be condemned and sold to pay the claim of your libellants, with interest and costs, and that otherwise right and justice may be done.

DONALD S. L. LEE.

Sworn to before me this 30th day of October, 1893.

LAWRENCE KNEELAND, 548
[L. S.] Notary Public,
Kings Co.
Cert. filed in N. Y. Co.

GEO. A. BLACK,
Proctor for Libellants,
44 Pine St.,
New York City.

(Endorsed)—Libel—Filed October 30, 1894.

To the Honorable CHARLES L. BENEDICT, United States District Judge for the Eastern District of 549
New York:

The answer of James Knott, owner and claimant of the steamship *Carib Prince*, to the libel and complaint of Clifford L. Middleton and Donald S. L. Lee, against the steamship *Carib Prince*, her engines, boilers, &c., in a cause of contract, civil and maritime, alleges as follows:

FIRST.—He has no knowledge of the matters alleged in the first article of the libel, and requires proof thereof, if material.

550 SECOND.—He has no knowledge of the matters alleged in the second article of the libel, and requires proof thereof, if and in so far as they are material.

THIRD.—He has no knowledge of the matters alleged in the third article of the libel, and requires proof thereof, if and in so far as they are material.

FOURTH.—He admits the matters contained in the fourth article of the libel.

551 FIFTH.—He denies that all and singular the premises are true, but admits the jurisdiction.

SIXTH.—For a further defense, the claimant avers that the bills of lading under which the merchandise in question is alleged to have been carried provided that the merchandise in question was "to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good manner and well conditioned, at the aforesaid port of New York; the act of God * * * loss or damage from heat or fire on board, in hulk or craft or on shore, explosion, steam, accidents to or latent defects in hull, tackle, boilers and machinery, or
552 their appurtenances, jettison, barratry, any act, neglect or default whatsoever of pilots, masters or crew in the management or navigation of the ship * * * and all and every other dangers and accidents of the seas, rivers, or steam navigation, of whatever nature or kind always excepted. * * * Weight, measure, quality, contents and value unknown, and not accountable for inaccurate description of cocoa shipped, for leakage, breakage or insufficiency in packing, or in strength of package, obliteration of, or inaccuracies of marks, numbers, designation, or address on the packages, nor for

damage or loss from vermin, sweating, decay, heat of holds, contact with, or smell or evaporation from other goods; nor from any consequences arising from any of the foregoing exceptions." 553

That the owner and charterer of said vessel used all due diligence to have her properly equipped, manned, provisioned and outfitted, and in every way seaworthy and capable of performing her intended voyage, and used all due diligence in and about the transportation of the merchandise in question, and alleges that if the cargo mentioned in the libel was damaged as alleged, the damage was due to latent defects in certain rivets, angle irons, braces and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage, as will more fully appear on the trial of this cause. 554

The claimant further alleges that each and all of the above mentioned exemptions in the bill of lading are valid by the law of England, which prevails at the port where said merchandise is claimed to have been shipped, and where the said bills of lading are alleged to have been issued.

Wherefore, claimant prays that the libel may be dismissed, with costs, or that the claimant have such other relief as he may be entitled to receive.

CONVERS & KIRLIN, 555
Proctors for Claimant.

Southern District of New York, ss.:

E. B. CONVERS, being duly sworn, says:

That he is one of the proctors for the claimant herein, and that the foregoing answer is true, according to his information and belief, derived from statements made by the officers of the said steam-

556 ship. He further says that the claimant is absent from the United States.

E. B. CONVERS.

Sworn to before me this 13th day of March, 1894.

CHARLES A. BRODEK,
[L. S.] Notary Public,
New York County.

(Endorsed)—Answer.—Filed March 13, 1894.

UNITED STATES DISTRICT COURT,

557

EASTERN DISTRICT OF NEW YORK.

CLIFFORD L. MIDDLETON *et al.*

vs.

S. S. "CARIB PRINCE."

The testimony and exhibits adduced upon the trial of this cause and the opinion of the District
558 Judge having been included in the record certified by the Clerk in the suit of Josephine W. Wuppermann against the steamship *Carib Prince*, we hereby stipulate that the same may be omitted from the record certified in this cause.

November 7, 1894.

CONVERS & KIRLIN,
Proctors for Clt.
GEO. A. BLACK,
Liblts.' Proctor.

At a Stated Term of the United States District Court for the Eastern District of New York, held in the Post Office Building, in the City of Brooklyn, on the 11th day of October, 1894. 559

Present—Hon. CHARLES L. BENEDICT,
District Judge.

CLIFFORD L. MIDDLETON *et al.*,
Libellants,

AGAINST

The Steamship "CARIB PRINCE,"
James Knott,
Claimant. 560

The above entitled cause having come on to be heard on the pleadings and proofs of the respective parties, and after hearing the advocates of the respective parties, and due deliberation having been had, now, on motion of Convers & Kirlin, proctors for the claimant, it is

Ordered, adjudged and decreed, that the libel in this cause be, and the same hereby is, dismissed, with costs; and the costs of the claimant having been taxed at the sum of $77.89, it is further 561

Ordered, adjudged and decreed, that the claimant, James Knott, recover in this action against the libellants above named, Clifford L. Middleton and Donald S. L. Lee, the sum of $77.89; and it is further

Ordered, adjudged and decreed, that unless an appeal be taken from this decree within the time allowed by law and the rules and practice of this Court, the stipulators for costs on the part of the libellants cause the undertaking of their stipulation to be performed, or show cause, within four days

562 thereafter, why execution should not issue against them, their goods, chattels, credits and lands, to enforce a satisfaction of this decree; and it is further

Ordered, that unless the libellants appeal from this decree within ten days, all stipulations given herein by the claimant be cancelled of record.

CHAS. L. BENEDICT.

(Endorsed)—Final Decree.—Filed and entered the 11th day of October, 1894.

DISTRICT COURT OF THE UNITED STATES

563

FOR THE EASTERN DISTRICT OF NEW YORK.

CLIFFORD L. MIDDLETON *et al.*

vs.

S. S. "CARIB PRINCE," her engines, &c.

Please take notice that the libellants herein appeal to the United States Circuit Court of Appeals for
564 the Second Circuit from the final decree entered herein on the 11th day of October, 1894.

Dated October 19, 1894.

GEO. A. BLACK,
Proctor for Libellants.

To Messrs. CONVERS & KIRLIN,
Claimant's Proctors.

B. LINCOLN BENEDICT,
Clerk.

(Endorsed)—Notice of Appeal.—Filed October 20, 1894.

U. S. DISTRICT COURT, 565

EASTERN DISTRICT OF NEW YORK.

CLIFFORD L. MIDDLETON *et al.*

vs.

The S. S. "CARIB PRINCE."

ASSIGNMENT OF ERRORS BY LIBELLANTS-APPELLANTS. 566

FIRST.—The District Court erred in holding that the steamship *Carib Prince* was not liable to the libellants for the damage to their cargo as alleged in the libel.

SECOND.—The District Court erred in holding that the exception of latent defects in the bill of lading exempted the steamship from liability to the libellants.

THIRD.—The District Court erred in not holding that the steamship *Carib Prince* was unseaworthy at the time she sailed with the cargo on board of 567
libellants, and that such unseaworthiness caused the injury to libellants' cargo.

FOURTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect to the construction of her ballast tank, which caused the injury to libellants' cargo.

FIFTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect

568 to the construction of her floor over her bilges, which caused the injury to the libellants' cargo.

SIXTH.—That the said District Court erred in dismissing the libel, and should have awarded a decree in favor of libellants for the damages sustained in their cargo.

GEO. A. BLACK,
Proctor for Libellants,
44 Pine Street,
New York City.

(Endorsed)—Assignments of Error by Libellants-Appellants.—Filed October 21, 1894.

569

UNITED STATES OF AMERICA,
Eastern District of New York, } ss.:

I, B. LINCOLN BENEDICT, Clerk of the United States District Court for the Eastern District of New York, do hereby certify that the foregoing is a true transcript of all the pleadings, proofs and papers on appeal, on file in my office, in the suit of Clifford L. Middleton and another against the steamship *Carib Prince*, her engines, &c., made up to be transmitted to the United States Circuit Court of Appeals for the Second Circuit, pursuant to rule.

570 In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of November, 1894.

B. LINCOLN BENEDICT,
Clerk.

[SEAL.]

UNITED STATES DISTRICT COURT, 571

EASTERN DISTRICT OF NEW YORK.

WILLIAM GILLESPIE, COLIN MACANDREW GILLESPIE, WILLIAM AUGUSTINE GRIFFIN and HOWARD KITCHENER FRANKLIN SMITH

AGAINST

The steamship "CARIB PRINCE," her engines, &c., James Knott, Claimant. 572

STATEMENT.

1893, Dec.	7.	Libel filed. No process issued.
"	13.	Claim filed by Jas. Knott, owner.
"	"	Stipulation for value filed.
1894, March	13.	Answer filed.
June	14 and 18.	Cause tried before Hon. Charles L. Benedict, Judge.
Oct.	4.	Decision rendered. 573
"	11.	Final decree entered.
"	20.	Order of substitution entered.
"	"	Notice of appeal and assignment of errors filed.

574 To the Honorable CHARLES L. BENEDICT, United States District Judge for the Eastern District of New York:

The libel and complaint of William Gillespie, Colin MacAndrew Gillespie, William Augustine Griffin and Howard Kitchener Franklin Smith, co-partners in business as merchants in the City of New York and elsewhere, under the name and style of Gillespie Brothers & Co., against the steamship *Carib Prince*, her engines, &c., and against all persons intervening for their interest therein in a cause of affreightment, civil and maritime, alleges and articulately propounds as follows:

575

FIRST.—That on or about the twenty-second day of August, 1893, certain persons transacting business under the firm name and style of Andre Guiseppi & Co. shipped on board the steamship *Carib Prince*, then put up as a general ship, and plying as a common carrier at the port of Trinidad, B. W. I., in good order and condition, seventy-five (75) bags of cocoa marked $\frac{\text{A. G. \& C.}}{\text{G. B. \& C.}}$, 1-75, and consigned the same to their order.

SECOND.—That thereupon the said shippers received from the agents of the said steamship a cer-
576 tain written bill of lading, duly executed by them, wherein and whereby they acknowledged the receipt of said cocoa in good order and condition, and agreed to deliver the same in like good order and condition to the order of the said shippers in the port of New York, upon the payment of freight thereupon at a rate therein fixed.

THIRD.—That thereupon the said steamship sailed from the said port and thereafter arrived at the port of New York and delivered the said shipment to your libellants, but not in like good order and condi-

tion as shipped, the said cocoa being badly damaged and deteriorated in value through contact with sea water. 577

FOURTH.—That heretofore the said shippers duly sold and delivered to your libellants the said shipment of cocoa, and duly assigned to them the said bill of lading and their rights in the premises.

FIFTH.—That by reason of the matters aforesaid your libellants became and are damaged in the sum of eight hundred and two $\frac{20}{100}$ dollars ($802.20).

SIXTH.—The said steamship *Carib Prince* is now within the jurisdiction of this Honorable Court. 578

SEVENTH.—That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, your libellants pray that process of arrest in due form of law, according to the course of this Honorable Court in like causes, may issue against the said steamship, her engines, &c., and against all persons intervening for their interests therein, and that the said steamship may be condemned and sold to satisfy the demands of your libellants, with interest and costs.

579

Southern District of New York, ss.:

G. DECORDOVA and J. F. WEBER, being duly sworn, depose and say: That they are the agents and attorneys in fact of the libellants above named; that they have read the foregoing libel and know the contents thereof, and that the same is true of their own knowledge; that deponents' knowledge is derived from papers and documents in their possession, showing the shipment of said goods, and their value, and the injury sustained by them. That the reason

580 why this verification is made by deponents and not by the libellants is that none of the libellants are now within the United States.

P. P. GILLESPIE BROS. & Co.
G. DECORDOVA.
J. F. WEBER.

Sworn to before me this 7th day of December, 1893.

HENRY HESSE,
[L. S.] Notary Public (54),
N. Y. City and Co.

SIDNEY CHUBB,
Proctor for Libellants.

581 (Endorsed)—Libel and Complaint.—Filed December 7, 1893.

To the Honorable CHARLES L. BENEDICT, United States District Judge for the Eastern District of New York:

The answer of James Knott, owner and claimant of the steamship *Carib Prince*, to the libel and complaint of William Gillespie, Colin MacAndrew Gillespie, William Augustine Griffin and Howard Kitchener Franklin Smith, described as and copartners in business as merchants, in the City of New York and elsewhere, under the firm name and style of
582 Gillespie Bros. & Co., against the steamship *Carib Prince*, her engines, &c., and against all persons intervening for their interest therein, in a cause of affreightment, civil and maritime, alleges as follows:

FIRST.—He has no knowledge of the matters alleged in the first article of the libel, and requires proof thereof, if and in so far as they are material.

SECOND.—He has no knowledge of the matters alleged in the second article of the libel, and requires proof thereof, if and in so far as they are material.

THIRD.—He has no knowledge of the matters al- 583
leged in the third article of the libel, and requires proof thereof, if and in so far as they are material.

FOURTH.—He has no knowledge of the matters alleged in the fourth article of the libel, and requires proof thereof, if and in so far as they are material.

FIFTH.—He has no knowledge of the matters alleged in the fifth article of the libel, and requires proof thereof, if and in so far as they are material.

SIXTH.—He admits the matters contained in the sixth article of the libel.

584

SEVENTH.—He denies that all and singular the premises are true, but admits the jurisdiction.

EIGHTH.—For a further defense, the claimant avers that the bills of lading under which the merchandise in question is alleged to have been carried, provided that the merchandise in question was "to be delivered from the ships's deck, where the ship's responsibility shall cease, in the like good manner and well conditioned, at the aforesaid port of New York; the act of God * * * loss or damage from heat or fire on board, in hulk or craft or on shore; explosion, steam, accidents to or latent defects in hull, tackle, boilers and machinery, or their appurtenances, jettison, barratry, any act, neglect or default whatsoever of pilots, masters or crew in the management or navigation of the ship * * * and all and every other dangers and accidents of the seas, rivers, or steam navigation, of whatever nature or kind, always excepted * * * Weight, measure, quality, contents and value unknown, and not accountable for inaccurate description of goods shipped, for leakage, breakage or insufficiency in packing, or in strength of package, obliteration of, or inaccuracies of marks, numbers, designation, or address on the

585

586 packages, nor for damage or loss from vermin, sweating, decay, heat of holds, contact with, or smell or evaporation from other goods, nor for any consequences arising from any of the foregoing exceptions."

That the owner and charterer of said vessel used all due diligence to have her properly equipped, manned, provisioned and outfitted, and in every way seaworthy and capable of performing her intended voyage, and used all due diligence in and about the transportation of the merchandise in question, and alleges that if the cargo mentioned in the libel was damaged as alleged, the damage was
587 due to latent defects in certain rivets, angle irons, braces and straps in the bulkhead between No. 1 hold and the peak tank just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage, as will more fully appear on the trial of this cause.

The claimant further alleges that each and all of the above mentioned exemptions in the bill of lading are valid by the law of England, which prevails at the port where said merchandize is claimed to have been shipped, and where the said bills of lading are alleged to have been issued.

Wherefore, claimant prays that the libel may be dismissed, with costs, or that the claimant have
588 such other relief as he may be entitled to receive.

CONVERS & KIRLIN,
Proctors for Claimant.

Southern District of New York, ss.:

E. B. CONVERS, being duly sworn, says: That he is one of the proctors for the claimant herein, and that the foregoing answer is true, according to his information and belief, derived from statements made by the officers of said steamship. He further

says that the claimant is absent from the United States. 589

E. B. CONVERS.

Sworn to before me this 13th day of March, 1894.

CHARLES A. BRODEK,
[L. S.] Notary Public,
New York County.

(Endorsed)—Answer.—Filed March 13, 1894.

UNITED STATES DISTRICT COURT. 590

EASTERN DISTRICT OF NEW YORK.

WILLIAM GILLESPIE *et al.*

vs.

Steamship "CARIB PRINCE."

The testimony and exhibits adduced upon the trial of this Court and the opinion of the District Judge having been included in the record certified by the 591
Clerk in the suit of Josephine W. Wupperman against the steamship *Carib Prince*, we hereby stipulate that the same may be omitted upon the record certified in this cause.

November 7, 1894.

CONVERS & KIRLIN,
Proctors for Liblt.
GEORGE A. BLACK,
Liblts.' Proctor.

592 At a Stated Term of the United States District Court for the Eastern District of New York, held in the Post Office Building in the City of Brooklyn, on the 11th day of October, 1894.

Present—Hon. CHARLES L. BENEDICT,
District Judge.

WILLIAM GILLESPIE *et al.*,
Libellants,

AGAINST

593 The Steamship "CARIB PRINCE," James Knott,
Claimant.

The above entitled cause having come on to be heard, on the pleadings and proofs of the respective parties, and after hearing the advocates of the respective parties, and due deliberation having been had, now, on motion of Convers & Kirlin, proctors for the claimant, it is

Ordered, adjudged and decreed, that the libel in this cause be, and the same hereby is, dismissed, with costs; and the costs of the claimant having
594 been taxed at the sum of $77.88; it is further

Ordered, adjudged and decreed, that the claimant, James Knott, recover in this action against the libellants above named, William Gillespie, Colin McAndrew Gillespie, William Augustine Griffin and Howard Kitchener Franklin Smith, the sum of $77.88; and it is further

Ordered, adjudged and decreed, that unless an appeal be taken from this decree, within the time allowed by law, and the rules and practice of this Court, the stipulators for costs on the part of the libellants, cause the undertakings of their stipulation to be performed, or show cause, within four

days thereafter, why execution should not issue 595
against them, their goods, chattels, credits and lands, to enforce a satisfaction of this decree; and it is further

Ordered, that unless the libellants appeal from this decree within ten days, all stipulations given herein by the claimant be cancelled of record.

CHAS. L. BENEDICT.

(Endorsed)—Final Decree.—Filed and entered the 11th day of October, 1894.

At a Stated Term of the District Court of the United States for the Eastern District of New York, held at the 596
Court Rooms in the U. S. Court House and Post Office Building, in the City of Brooklyn, on the 20th day of October, 1894.

Present—CHAS. L. BENEDICT, *District Judge*.

WILLIAM GILLESPIE *et al.*

vs.

S. S. "CARIB PRINCE," her engines, &c.

597

On reading and filing the annexed consent, it is

Ordered, that George A. Black be, and hereby is, substituted in the place and stead of Sidney Chubb, Esq., as proctor for the libellants herein.

CHAS. L. BENEDICT.

I consent to the entry of above order.

SIDNEY CHUBB,
Proctor for Libellants.

(Endorsed)—Consent and Order for Substitution.—Filed and entered the 20th day of October, 1894.

598 DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK.

WILLIAM GILLESPIE *et al.*

vs.

Steamship "CARIB PRINCE," her engines, &c.

599 Please take notice that the libellants herein appeal to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered herein on the 11th day of October, 1894.

Dated October 19, 1894.

GEO. A. BLACK,
Proctor for Libellants.

To Messrs. CONVERS & KIRLIN,
Claimant's Proctors.

B. LINCOLN BENEDICT, Esq.,
Clerk.

(Endorsed)—Notice of Appeal.—Filed Oct. 20, 1894.
600

UNITED STATES DISTRICT COURT, 601

EASTERN DISTRICT OF NEW YORK.

WILLIAM GILLESPIE *et al.*

vs.

The Steamship "CARIB PRINCE."

ASSIGNMENT OF ERRORS BY LIBELLANTS-APPELLANTS. 602

FIRST.—The District Court erred in holding that the steamship *Carib Prince* was not liable to the libellants for the damage to their cargo alleged in the libel.

SECOND.—The District Court erred in holding that the exception of latent defects in the bill of lading exempted the steamship from liability to the libellants.

THIRD.—The District Court erred in not holding that the steamship *Carib Prince* was unseaworthy at the time she sailed with the cargo of libellants on board, and that such unseaworthiness caused the 603
injury to libellants.

FOURTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect to the construction of her ballast tank, which caused the injury to libellants' cargo.

FIFTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect to the construction of her floor over her bilges, which caused the injury to libellants' cargo.

604 SIXTH.—That the said District Court erred in dismissing the libel and should have awarded a decree in favor of libellant for the damages sustained to their cargo.

GEO. A. BLACK,
Proctor for Libellant,
44 Pine St.,
New York City.

(Endorsed)—Assignment of Errors by Libellants-Appellants.—Filed October 20, 1894.

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605 UNITED STATES OF AMERICA, }
Eastern District of New York, } ss.:

I, B. LINCOLN BENEDICT, Clerk of the United States District Court for the Eastern District of New York, do hereby certify that the foregoing is a true transcript of the pleadings, proofs and papers on appeal on file in my office in the suit of William Gillespie *et al.* against the steamship *Carib Prince*, her engines, &c., made up to be transmitted to the United States Circuit Court of Appeals for the Second Circuit, pursuant to rule.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at the City of
606 Brooklyn, this 15th day of November, 1894.

B. LINCOLN BENEDICT,
[SEAL.] Clerk.

U. S. Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

JOSEPHINE W. WUPPERMANN
vs.
The Steamship CARIB PRINCE.

CLIFFORD L. MIDDLETON, *et al.*
vs.
The same.

MANUEL CADENAS and another
vs.
The same.

WILLIAM GILLESPIE, *et al.*
vs.
The same.

SHIPMAN, *C. J.* These four actions were brought by cargo owners to recover from the British steamship Carib Prince, the damages which a part of her cargo received on a voyage from Grenada to New York which commenced about August 31, 1893. The bills of lading, which were signed in Trinidad, a port governed by English law, excepted the ship from liability for injuries arising from "latent defects in hull, tackle, boilers and machinery."

The vessel was a new steel steamer of 2,500 tons dead weight capacity, built in the spring of 1893 at Sunderland, England, by experienced builders. She was "constructed with a water tank

of iron in her peak, one side of which was formed by a bulkhead. The tank, when she sailed from Grenada, was empty, but during the voyage from Grenada to New York it was filled with water one afternoon, in order to trim the vessel," and the next morning, or the morning after, the tank was found partially empty, and investigation showed that the head had come off from one of the rivets riveting the side of the bulkhead next to the hold, and leaving a hole through which water had poured upon the libellants' merchandise stowed near the bulkhead. The rivet was the end rivet in a series which attached a transverse "knee tie" to the bulkhead on the inside of the tank.

The testimony clearly showed that abundant diligence was used in the construction of the vessel, that the defect in the rivet was a latent one which occurred at the time of the vessel's construction, which was not discovered and was not discoverable at that time, or subsequently, by the exercise of all the known and customary tests and methods of examination, which were all employed : that it was a latent and undiscovered defect in the hull of the vessel at the commencement of the voyage from Trinidad, that, consequently, the vessel was not, at said time, seaworthy, and that the injury occurred solely through this unseaworthiness and not by reason of filling the tank injudiciously.

The main question in the case is whether the bills of lading expressly or clearly limited the implied and absolute warranty of seaworthiness, which is that the ship was in fact seaworthy at the commencement of the voyage, and is a warranty against latent, unknown and not discoverable defects. (The Edwin I. Morrison, 153 U. S. 199. The Caledonia, 156 U. S. The Glenfruin, 10 Prob., Div. 103.) The recent case of the Caledonia, *supra*, declared that exemptions in bills of lading which limit the extent of this implied warranty, must be expressed in clear terms, or they will be construed strongly against the ship-owner, and consequently held that an exemption which excluded loss or damage from defects in steam boilers and machinery, did not mean defects existing at the commencement of the voyage, and thereupon did not protect the owner from liability for unseaworthiness.

The bills of lading in these cases exclude losses arising from latent defects in the hull, and the question is whether this language does not necessarily mean defects existing at the time of shipment, and therefore whether it does not clearly

and even expressly exclude unseaworthiness arising from such defects.

The only case in which the effect of an exemption of "latent defects" is discussed is "The Laertes, 12 Prob., Div. 187," but in that case the language of the bill of lading was "latent defects * * even existing at time of shipment," so that the intention of the parties to limit the implied warranty was manifest. In the cases at bar, it is urged that latent defects must necessarily mean those existing at the time of shipment, and that any other construction is exceedingly strained. A defect in order to be latent must have been not discoverable at the time of the shipment. It could not in its nature have been capable of discovery then and have become capable of evading discovery subsequently. A construction which should say that latent defects meant those only which had become latent since the vessel left the wharf, and could not mean previously existing defects, savors of the distinctions of the schoolmen, and if latent defects existing upon the voyage are exempted, those existing at the time of the shipment are included, for they are the same.

We concur with the experienced district judge, that the exception "limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the owner."

It is insisted by the libellants that the second section of the act of February 13, 1893 (27 U. S. Stat. 445), commonly known as the Harter Act, prohibits any clause in a bill of lading which limits the implied warranty of seaworthiness. The section is as follows:

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided."

Waiving the question whether this section applies to a foreign contract entered into by owners who are foreigners, the section does not bear the construction placed upon it by the libellants, which is that a comma shall be inserted after the word "diligence," and that the clause respecting seaworthiness shall be read as a prohibition of any covenant or agreement "whereby the obligations of the owner of said vessel to make said vessel seaworthy, &c., shall in any wise be lessened." The language of the section, as passed by the House of Representatives, permits this construction, but in the Senate the words "exercise due diligence" were inserted prior to the words "properly equip," and the evident intent of the section as amended and the effect of the amendment, was to prohibit covenants whereby the obligation of the owners to exercise due diligence *to* properly equip, man, provision and outfit his vessel and to make her seaworthy should be lessened. A like amendment was inserted in the third section, which provided that if the owner exercised due diligence to make the vessel seaworthy, he should not be responsible for damage resulting from subsequent faults in navigation. These amendments indicate the intent which ran through the act as it left the Senate, and make it plain that one design of the act as amended was to permit the owner to relieve himself from the rigidity of the warranty of seaworthiness but not to permit him to lessen his obligation to exercise due diligence in all respects at the inception of the voyage.

The claimant endeavored to show that the cause of the injury was an error of the master in filling the tank at sea, and that therefore the owner was protected by the third section of the Harter Act, but as the injury did not arise from an error in the management of the vessel, an examination of this section is unnecessary.

The decrees of the District Court are affirmed with costs.

GEORGE A. BLACK,
For the Libellants.

J. PARKER KIRLIN,
For the Respondents.

(Endorsed) United States Circuit Court of Appeals, for the Second Circuit.—Josephine W. Wupperman *v.* The Steamship Carib Prince.—Clifford L. Middleton, *et al.*, *v.* Same.—Manuel Cardenas, *et al.*, *v.* Same.—William Gillespie, *et al.*, *v.* Same.—Opinion, Shipman, C J.—United States Circuit Court of Appeals, Second Circuit, filed May 28, 1895, James C. Reed, Clerk.

217 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from one to two hundred and sixteen, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cases of Josephine Wuppermann, libellant and appellant, *vs.* The Steamship "Carib Prince," her engines, &c., Ernest C. Legge, claimant and appellee; Manuel Cadenas and Edward P. Coe, libellants and appellants, *vs.* The Steamship "Carib Prince," her engines, &c.; James Knott, claimant and appellee; Clifford L. Middleton and Donald S. L. Lee, libellants and appellants, *vs.* The Steamship "Carib Prince," her engines, &c.; James Knott, claimant and appellee; William Gillespie, Colin MacAndrew Gillespie, William Augustine Griffin, and Howard Kitchener Franklin Smith, libellants and appellants, *vs.* The Steamship "Carib Prince," her engines, &c.; James Knott, claimant and appellee, as the same remain- of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of June, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and nineteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JAMES C. REED, *Clerk.*

218 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which Josephine W. Wupperman is appellant and The Steamship "Carib Prince," her engines, &c.—Ernest Legge, claimant—is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the eastern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals
219 and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 23d day of October, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

We consent that the certified copy of the proceedings in the U. S. circuit court of appeals for the second circuit in the case of Wupperman *vs.* The S. S. Carib Prince, filed with the petition for certiorari, be taken as the return to the within certiorari.

Nov. 16th, 1895.

CONVERS & KIRLIN,
Proctors for Claimant of Carib Prince.
GEO. A. BLACK,
Proctor for Lib'l't.

220 [Endorsed:] Supreme Court of the United States. No. 639, October term, 1895. Josephine W. Wupperman *vs.* The Steamship "Carib Prince," &c. Writ of certiorari.

221 At a stated term of the United States circuit court of appeals for the second circuit, held at the United States court-rooms, in the post-office building, in the city of New York, on the fifth day of June, 1895.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

JOSEPHINE W. WUPPERMANN, Appellant,
against
THE STEAMSHIP CARIB PRINCE; JAMES KNOTT, Claimant.

The appeal of the libelant herein having come on for hearing in this court and having been argued by the advocates of the respective parties and submitted and due deliberation being had, now, on motion of Convers & Kirlin, proctors for the claimant, it is—

Ordered, adjudged, and decreed that the decree of the district court for the eastern district of New York herein be, and the same hereby is, affirmed, with costs of this court to the claimant.

And on like motion it is further—

Ordered that a mandate issue from this court to said district court to take such further proceedings as may be required in conformity with the opinion of the court and with this order herein.

E. H. L.
N. S.

222 SIR: Please take notice that the foregoing order will be handed to the clerk of the circuit court of appeals, at his chambers, in the post-office building, New York, on June 5th, 1895, at ten o'clock a. m., for transmission to the judges of the circuit court of appeals.

Yours, &c.,
CONVERS & KIRLIN,
Proctors for Claimant, App'ee.

New York, June 3rd, 1895.

To George A. Black, Esq., proctor for libelant, appellant.

1854

223 [Endorsed:] U. S. circuit court of appeals. Josephine W. Wuppermann against The Steamship Carib Prince. Order affirming decree and notice. Convers & Kirlin, proctors for appellee, 5 Beekman St., New York, N. Y. U. S. circuit court of appeals, second circuit. Filed June 5, 1895. James C. Reed, clerk. Rec'd June 4, '95.

224 UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from two to five, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Josephine W. Wupperman, libellant, appellant, against The Steamship "Carib Prince," libellant, appellee, as the same remains of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this tenth day of December, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and twentieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED, *Clerk.*

[Endorsed:] Carib Prince. No. 639. Return. 639, 15,928. Jan. 10th, 1896.

225 [Endorsed:] Case No. 15,928. Supreme Court U. S., October term, 1895. Term No., 639. Josephine W. Wupperman, appellant, *vs.* Steamship "Carib Prince," &c. Writ of certiorari and return. Filed Jan. 10, 1896.

Endorsed on cover: Case No. 15,928. U. S. circuit court of appeals, second circuit. Term No., 639. Josephine W. Wuppermann, appellant, *vs.* The Steamship "Carib Prince," her engines, &c., Ernest Legge, claimant. Filed June 3rd, 1895.

JUN 3 1895
JAMES H. McKENNEY,
CLERK.

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U. S. Supreme Court.

Josephine W. Wuppermann,

vs.

The S. S. Carib Prince, Ernest Legge,

Claimant.

Petition of Libellant for Writ of Certiorari to the U. S. C. C. of Ap. for 2d Cir.

Please take notice that the within petition will be presented to the U. S. Supreme Court, at the Capitol in the City of Washington, on June 3d, 1895, on the opening of Court.

Yours, &c.,

GEORGE A. BLACK,
Proctor for Libellant.

TO CONVERS & KIRLIN,
Proctors for Claimant.

John Polhemus Printing Co., 121 Fulton St., N. Y.

Supreme Court of the United States.

JOSEPHINE W. WUPPERMANN,
Libellant,

vs.

The Steamship CARIB PRINCE, ERNEST LEGGE,
Claimant.

And now comes Josephine W. Wuppermann by George A. Black, her advocate, and moves this Honorable Court for a **writ of certiorari** directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, commanding them to certify and return to this Court all the proceedings by them had in the suit in admiralty lately tried before them between said Josephine W. Wuppermann and Ernest Legge, claimant of the steamship Carib Prince.

GEO. A. BLACK,
Advocate for Petitioner,
44 Pine street, N. Y.

To the Supreme Court of the United States.

The petition of Josephine W. Wuppermann respectfully shows as follows:

I. That heretofore she filed her libel in admiralty in the U. S. District Court for the E. D. of N. Y., against the British steamship Carib Prince, to recover for damages to her cargo while laden on said vessel on a voyage from Trinidad to New York, and that Ernest Legge, master of said steamship, appeared as

claimant and answered said libel, and the issues therein were tried by said District Court and the libel dismissed.

II. That petitioner duly appealed to the United States Circuit Court of Appeals, for the Second Circuit, from the decree of said District Court, dissmissing said libel, and said appeal was tried in said Court of Appeals, and on May 28, 1895, the opinion and decision of said Court of Appeals was announced, affirming said decree of said District Court and dismissing said libel, but no mandate thereon has yet been issued.

III. That petitioners cargo was damaged by water which entered the No. 1 lower hold from the forepeak ballast tank of said vessel, through a rivet hole in the collision bulkhead which formed the after side of said tank. The tank was filled at sea in fine weather for the purpose of trimming the ship, and thirty-two hours after it was so filled four feet of water was found in the after end of No. 1 hold, which had escaped from the tank through said rivet hole, in consequence of the clinch of the rivet breaking off on the hold side of said bulkhead. The rivet was out and on examination it was found that the rivet holes did not **fair**, (*i. e.* were not in line or true with each other) which caused the rivet to break. The water which so ran into No. 1 lower hold could not pass off through the bilges provided for that purpose on account of the **limbers**, (*i. e.*, strips of plank laid over the bilges forming the floor of the hold in the line of the bilges), being fitted so tight that no water got through them until holes were bored in them by the ship's carpenter. (Apostles 37, 36). Neither the District nor Circuit Court referred to or passed upon this undisputed defect.

IV. The bill of lading for petitioner's cargo contained the words **"latent defects in hull excepted."**

This bill of lading was issued by the charterers of the vessel. The charter party warranted that the vessel was "*tight, staunch and strong*" (*Apostles*, fol. 438). And it was therein covenanted that the owners should maintain her in a thoroughly efficient state in hull and machinery. (*Apostles*, fol. 440). And that the form of bill of lading used by the charterers should contain the usual negligence clause (*Apostles*, fol. 450), but no other exception was mentioned.

V. That the libellant contended that the Carib Prince was unseaworthy in two respects :

(*a*) by reason of the defects in the rivet holes, which caused the rivet to break.

(*b*) by reason of the defects in the limbers which prevented the water reaching the bilges provided for the purpose of carrying it off.

In support of these contentions petitioner presented the brief to the U. S. Circuit Court of Appeals which, as well as a certified copy of the proceedings in said Court of Appeals and of its opinion, is herewith filed.

The claimant of said steamship contended that the exception of **latent** defects in the bill of lading permitted the unseaworthiness of the vessel without liability therefor, and that this British ship was entitled to the benefits of the Harter Act, and that the owner thereof was excused by that Act for the unseaworthiness of his ship as he claimed to have shown "due diligence" in making her seaworthy.

VI. The Circuit Court of Appeals held among other things as follows :

A. "The defect in the rivet was a latent one which "occurred at the time of the vessels construction

Note.—The vessel was built for the owners under contract and under the supervision of their naval architect James (*Apostles* fol. 250), and their surveyor Lynn (*Ap.*, fol. 212).

"which was not discovered and was not discoverable at that "time,

Note.—The man that put the rivet in the un-*fair* holes knew they were un-fair, and so would the surveyor if he had been attentive and examined them.

"or subsequently, by the exercise of all known and "customary tests and modes of examination."

Note.—The Carib Prince was in the hurricane of Aug. 20, 1893, and was severely strained (*Ap.* 64), had to heave to and use oil (log 57 to 62), and yet the customary tests of filling the tank with water and testing the rivets with a hammer were not adopted before loading the petitioners cargo, See p. 12 of libellants brief in C. C. of Ap.

"which were all employed ;

Note.—The tests above mentioned were employed before the owners accepted the C. P. from her builders, *and then only.* [Apostles 222] and the tank had never been filled after that until the occasion in question [Ap. 67, 68.]

"that it was a *latent* and undiscovered defect in the hull
" of the vessel at the commencement of the voyage from
" Trinidad, *that consequently the vessel was not, at said time,*
" *seaworthy, and* **that the injury occurred solely**
" **through this unseaworthiness** and not by
" reason of filling the tank injudiciously."

B. " The main question in the case is whether the bills of
" lading expressly or clearly limited the implied and ab-
" solute warranty of seaworthiness—which is that the ship
" was in fact seaworthy at the commencement of the voyage
" and is a warranty against latent, unknown and undiscover-
" able defects" * * " *In the case at bar it is urged that*
" **latent** *defects must necessarily mean those existing at*
" *the time of shipment.* * * A defect in order to be latent
" must have been not discoverable at the time of shipment.
" It could not in its nature have been capable of discovery
" then, and have become capable of evading discovery sub-
" sequently." * *

"If latent defects existing upon the voyage are exempted,
" those existing at the time of the shipment are included,
" for they are the same."

Note.—The learned Circuit Judges did not consider the effect of the express warranty of the charter "*tight, staunch and strong*" (Apostles fol. 438), *and gave to the ship* the benefit of the exception of the bill of lading although this was a contract between the charterer and petitioner, but refused the benefit of the charter-clause to petitioner presumably because the charter is a contract between the ship-owner and charterer.

" We concur with the experienced District Judge, that
" the exception 'limits the warranty which the law would
" 'otherwise imply that the ship was seaworthy at the be-
" 'ginning of the voyage and exempts the ship if due dili-
" 'gence is exercised by the owner.' "

Note.—This Court in the Caledonia (157, U. S.) held that a bill of lading which read, "steam boilers and machinery or **defects** therein * * excepted" did not exempt the vessel from

liability for a *latent* defect which made her unseaworthy. Does not "defects" include both latent and patent defects?

Has the Circuit Court of Appeals rightly applied the law of that case to this?

C. "It is insisted by the libellants that the second section of the act of February 13th, 1893 (27 U. S. Stat., 445), commonly known as the Harter Act, *prohibits any clause in a bill of lading which limits the implied warranty of seaworthiness.* The section is as follows:

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the *obligations* of the owner or owners of said vessel *to exercise* due diligence properly equip, man, provision and outfit said vessel, *and to make said vessel seaworthy* and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver the same, *shall in any wise be lessened, weakened or avoided.*"

* * "This section does not bear the construction placed upon it by the libellants which is, *that a* **comma** *shall be inserted* after the word 'diligence,' and that the clause respecting seaworthiness shall be read as a prohibition of any covenant or agreement 'whereby the obligations of 'the owner of said vessel to make said vessel seaworthy, 'etc., shall in any wise be lessened.'"

Note.—The learned judge then considers the effect to be given to *alleged* amendments made to the bill in the Senate [no proof of which was made and as to which the Apostles are absolutely silent] and concluded that while the section as it passed the House permits [and obviously required] this construction, yet the Senate amendments [as the learned judge thought] were inserted with the evident intent to prohibit covenants "whereby the obligation of the owners to exercise due diligence **to** properly equip, man, provision and outfit his vessel and to make her seaworthy should be lessened." It will be observed

that the learned judge, in place of a comma after "*diligence*" has inserted the preposition "*to*" in order to arrive at this construction of the sentence—and he thereby makes the words "due diligence, a qualification of each of the following verbs, "equip, man, provision *and* outfit" which is evidently unnecessary in view of the "*properly*" which already qualified them, and also carries the "due diligence" past the second "*and*" and makes that sentence read "*and due diligence to* "*make said vessel seaworthy.*"

What right has the learned judge to assume that the House of Representatives (which by its original bill forbade the shipowner to throw off his common law liability by any covenant), intended to recede from this position when it accepted an amendment which does not in itself need that interpretation? It may be the Senate thought the amendment relieved the shipowner and that the House did not and therefore was willing to accept the Senate's verbal changes.

There is nothing in § 3 which exacts any other construction; not a line in it excuses from *unseaworthiness* of the vessel, but it permits the discharge of the ship owner from damage "**resulting** from faults or errors in navigation, or in the "management of said vessel," upon the condition expressed, i. e., "if the owner shall exercise due diligence to make said ves- "sel seaworthy."

The requirement of seaworthiness, *implied by law*, in every contract of shipment, and also implied by law in every insurance contract, and a condition precedent to the latter, is based upon *public policy*, and a change in such policy as to the shipowners by implication should not be favored, leaving as it does the shipper still bound to warrant the seaworthiness of the vessel to the insurer. The Eugene Vesta, 28 F. R., 762. This Court in the Caledonia (157 U. S.), quotes from Cohn *vs.* Davidson, 2 Q. B. D., 455, approvingly as follows:

> "As therefore the merchant, in a case like the present, "would not be entitled to recover against his underwriter by "reason of the breach of warranty in sailing in an unsea- "worthy ship, it would follow that if the warranty to be "implied on the part of the ship owner is to be exhausted "by his having the ship seaworthy at an anterior period, "the merchant would lose that complete indemnity by "means of the two contracts taken together which it is the "universal habit and practice of mercantile men to endeavor "to procure.

VII. That petitioner believes that this is the first case in which the Harter Act has received construction from any U. S. Circuit Court of Appeals and that the proper interpretation thereof, especially as to the right of the ship owner by contract, to limit his obligation to provide a seaworthy ship, involving as it does the lives of passengers and crew and affecting liability for the vast values of property entrusted to ships for carriage and the possibility of effecting valid insurance, makes this a proper case for this Court to review said decision.

Wherefore petitioner prays that this Court will grant its writ of *certiorari* to the said U. S. Circuit Court of Appeals for the Second Circuit to send the said cause before this Court, and your petitioner will ever pray, etc.

JOSEPHINE W. WUPPERMANN,
by GEO. A. BLACK,
her Proctor.

Southern District of New York, ss.:

GEORGE A. BLACK, being duly sworn, says, that he is the Proctor for Josephine W. Wuppermann in the cause against the S.S. Carib Prince, mentioned in the above petition and that the matters stated in said petition relating to said cause are true. That the reason why this verification is not made by said petitioner is that she has no personal knowledge of said matters.

GEORGE A. BLACK.

Sworn to before me, this 31st day of May, 1895.

LAWRENCE KNEELAND,
[SEAL.] Notary Public, Kings Co.

Cert. filed in N. Y. Co.

I certify that I have examined the foregoing petition and that in my opinion the same is well founded and one in which the prayer thereof should be granted.

GEORGE A. BLACK,
Advocate.

U. S. Circuit Court of Appeals

FOR THE SECOND DISTRICT.

JOSEPHINE W. WUPPERMANN *vs.* The Steamship CARIB PRINCE.
CLIFFORD L. MIDDLETON, *et al.* *vs.* The same.
MANUEL CADENAS and another *vs.* The same.
WILLIAM GILLESPIE, *et al.* *vs.* The same.

SHIPMAN, *C. J.* These four actions were brought by cargo owners to recover from the British steamship Carib Prince, the damages which a part of her cargo received on a voyage from Grenada to New York which commenced about August 31, 1893. The bills of lading, which were signed in Trinidad, a port governed by English law, excepted the ship from liability for injuries arising from "latent defects in hull, tackle, boilers and machinery."

The vessel was a new steel steamer of 2,500 tons dead weight capacity, built in the spring of 1893 at Sunderland, England, by experienced builders. She was "constructed with a water tank

of iron in her peak, one side of which was formed by a bulkhead. The tank, when she sailed from Grenada, was empty, but during the voyage from Grenada to New York it was filled with water one afternoon, in order to trim the vessel," and the next morning, or the morning after, the tank was found partiall empty, and investigation showed that the head had come off from one of the rivets riveting the side of the bulkhead next to the hold, and leaving a hole through which water had poured upon the libellants' merchandise stowed near the bulkhead. The rivet was the end rivet in a series which attached a transverse "knee tie" to the bulkhead on the inside of the tank.

The testimony clearly showed that abundant diligence was used in the construction of the vessel, that the defect in the rivet was a latent one which occurred at the time of the vessel's construction, which was not discovered and was not discoverable at that time, or subsequently, by the exercise of all the known and customary tests and methods of examination, which were all employed ; that it was a latent and undiscovered defect in the hull of the vessel at the commencement of the voyage from Trinidad, that, consequently, the vessel was not, at said time, seaworthy, and that the injury occurred solely through this unseaworthiness and not by reason of filling the tank injudiciously.

The main question in the case is whether the bills of lading expressly or clearly limited the implied and absolute warranty of seaworthiness, which is that the ship was in fact seaworthy at the commencement of the voyage, and is a warranty against latent, unknown and not discoverable defects. (The Edwin I. Morrison, 153 U. S. 199. The Caledonia, 156 U. S. The Glenfruin, 10 Prob., Div. 103.) The recent case of the Caledonia, *supra*, declared that exemptions in bills of lading which limit the extent of this implied warranty, must be expressed in clear terms, or they will be construed strongly against the ship-owner, and consequently held that an exemption which excluded loss or damage from defects in steam boilers and machinery, did not mean defects existing at the commencement of the voyage, and thereupon did not protect the owner from liability for unseaworthiness.

The bills of lading in these cases exclude losses arising from latent defects in the hull, and the question is whether this language does not necessarily mean defects existing at the time of shipment, and therefore whether it does not clearly

and even expressly exclude unseaworthiness arising from such defects.

The only case in which the effect of an exemption of "latent defects" is discussed is "The Laertes, 12 Prob., Div. 187," but in that case the language of the bill of lading was "latent defects * * even existing at time of shipment," so that the intention of the parties to limit the implied warranty was manifest. In the cases at bar, it is urged that latent defects must necessarily mean those existing at the time of shipment, and that any other construction is exceedingly strained. A defect in order to be latent must have been not discoverable at the time of the shipment. It could not in its nature have been capable of discovery then and have become capable of evading discovery subsequently. A construction which should say that latent defects meant those only which had become latent since the vessel left the wharf, and could not mean previously existing defects, savors of the distinctions of the schoolmen, and if latent defects existing upon the voyage are exempted, those existing at the time of the shipment are included, for they are the same.

We concur with the experienced district judge, that the exception "limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the owner."

It is insisted by the libellants that the second section of the act of February 13, 1893 (27 U. S. Stat. 445), commonly known as the Harter Act, prohibits any clause in a bill of lading which limits the implied warranty of seaworthiness. The section is as follows:

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided."

Waiving the question whether this section applies to a foreign contract entered into by owners who are foreigners, the section does not bear the construction placed upon it by the libellants, which is that a comma shall be inserted after the word "diligence," and that the clause respecting seaworthiness shall be read as a prohibition of any covenant or agreement "whereby the obligations of the owner of said vessel to make said vessel seaworthy, &c., shall in any wise be lessened." The language of the section, as passed by the House of Representatives, permits this construction, but in the Senate the words "exercise due diligence" were inserted prior to the words "properly equip," and the evident intent of the section as amended and the effect of the amendment, was to prohibit covenants whereby the obligation of the owners to exercise due diligence *to* properly equip, man, provision and outfit his vessel and to make her seaworthy should be lessened. A like amendment was inserted in the third section, which provided that if the owner exercised due diligence to make the vessel seaworthy, he should not be responsible for damage resulting from subsequent faults in navigation. These amendments indicate the intent which ran through the act as it left the Senate, and make it plain that one design of the act as amended was to permit the owner to relieve himself from the rigidity of the warranty of seaworthiness but not to permit him to lessen his obligation to exercise due diligence in all respects at the inception of the voyage.

The claimant endeavored to show that the cause of the injury was an error of the master in filling the tank at sea, and that therefore the owner was protected by the third section of the Harter Act, but as the injury did not arise from an error in the management of the vessel, an examination of this section is unnecessary.

The decrees of the District Court are affirmed with costs.

GEORGE A. BLACK,
For the Libellants.

J. PARKER KIRLIN,
For the Respondents.

(Endorsed) United States Circuit Court of Appeals, for the Second Circuit.—Josephine W. Wupperman *v.* The Steamship Carib Prince.—Clifford L. Middleton, *et al.*, *v.* Same.—Manuel Cardenas, *et al.*, *v.* Same.—William Gillespie, *et al.*, *v.* Same.—Opinion, Shipman, C J.—United States Circuit Court of Appeals, Second Circuit, filed May 28, 1895, James C. Reed, Clerk.

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Brief of Black for Appt.

U. S. Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

Filed June 3, 1895.

Josephine W. Wupperman,

Libellant and Appellant,

vs.

The S. S. Carib Prince, Ernest Legge,

Claimant and Appellee.

And Three Other Cases.

Brief for Libellants.

The Harter Act Reviewed.

GEORGE A. BLACK,

Advocate.

John Polhemus Printing Co., 121 Fulton St., N. Y.

U. S. Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

JOSEPHINE W. WUPPERMAN,
Libellant and Appellant,

vs.

The S.S. CARIB PRINCE, ERNEST LEGGE,
Claimant and Appellee.

And Three Other Cases.

Brief for Libellants.

These four appeals are from the decrees of the U. S. D. C. for the E. D. of N. Y., dismissing the four libels for damage to cargo shipped on the S.S. Carib Prince.

The four libellants are: 1, Josephine W. Wupperman, Libel, p. 2; 2, Cadenas & Co., Libel, p. 175; 3, Middleton & Co., Libel, p. 190; 4, Gillespie Brothers & Co., Libel, p. 200.

The Carib Prince.

While in course of construction, this vessel was chartered to George Christall to run in the Trinidad Line, by a time charter, dated Sept. 14, 1892 (437), in which the owners warranted the steamer *tight, staunch and strong*, and every way fitted for the service (438). By the charter the owners are to appoint three engineers, and the charterer the rest of the officers and crew, including the captain (439).

The charter also provides that the owners shall maintain the

steamer in a thoroughly efficient state in hull and machinery (440), and (Art. 18) that bills of lading used by the charterers should contain the usual negligence clause (450).

There are no other exceptions in the charter.

The vessel was built at Sunderland, England, and was constructed with a water ballast tank in her fore peak, the collision bulkhead being the after end of the tank and the forward end of hold No. 1. The cargo was damaged by a leak through a rivet hole in this bulkhead on the voyage from Trinidad to New York, in September, 1893.

The Construction of the Tank.

The collision bulkhead or after end of the tank extended from side to side of the ship, a distance of about 38 feet (105). In order to strengthen this bulkhead, it was fastened on its forward face by what is indifferently called a knee-tie, gusset or angle (which was a triangular plate of iron) to the stringers on each side of the vessel, which ran horizontally from the bulkhead to the bow, along the side of the ship (Saunders, 421), and to this gusset or knee-tie was fastened a *single* angle-iron by rivets, which angle-iron in its turn was fastened by rivets to the bulkhead (Engineer Keeys, 118; Capt. Legge, 26; Martin, 269). See model (375, 376).

The vessel sailed from Trinidad on August 31st, with libellants' cargo stowed in her No. 1 lower hold, stopped at Granada, just north of Trinidad (28), but took in no cargo, and then proceeded on her voyage to New York.

She drew fourteen feet two inches forward and sixteen feet ten inches aft on leaving port (Capt. Legge, 41), being two feet by the stern. On September 3d, Capt. Legge, deeming it absolutely necessary to change her trim and bring her more by the head, ordered this tank filled with water (40). This was done by ten o'clock that evening (Ship's Log, p. 162, Legge, fol. 80; Scott, 304). The weather was fine (304), and the ship was not stopped (305).

At six o'clock on the morning of the 5th of September it was discovered that this tank, which held 83 tons of water (22, 106), was partly empty. This discovery was made by the ship's carpenter sounding in the tank (First Officer Scott, 282), and the entry, under date of September 5th, in the engineer's

log corroborates this (page 164). Capt. Legge, at folio 32, says the discovery was made the next morning, *i. e.*, on the 4th of September (47), but he corrects this when he looked at his log at folio 80, and says that the tank had been filled for a period of 32 hours.

The Discovery of the Leak.

Carpenter Hopkins (321) says he sounded the different holds morning and evening (321)—that the sounding well of No. 1 is at the after end, close against the bulkhead (330)—that the sounding rod goes down to the bottom of the limbers (323)—that the tank was filled Sunday night and *he thinks* the leak was found on Monday morning.

This is an error as the log shows and as Capt. Legge says (80) and Eng. Keeys also says it was filled on the night of Sept. 3 and emptied on the morning of Sept. 5 (107).

Hopkins says (325): "I sounded the tank and found a defi-"ciency in the tank and *then* I went to the limbers and found "there was water in it." He then informed Mate Scott, who says (282): "The carpenter after sounding the ship at 6 A.M. "came and reported to me that the tank was slack or leaking."

Eng. Keeys says (108) the water in No. 1 hold was discovered "by the decrease of water in the tank"—discovered by the carpenter—by sounding the tank. He also says no soundings to his knowledge had been taken in the tank before this (109).

Keeys says (109) he went down into No. 1 hold and found Mate Scott there (110) and Scott says (285) that Keeys was there with him. They found from 3 to 4 feet of water at the after end of the No. 1 hold (283, 113) and about 8 inches at the forward part (283).

Eng. Keeys says (114) that they formed an idea where the leak was from hearing the water gurgling, and moved the cargo and "there was a bore of water coming; the hole was full of "water; it was spurting out with considerable force and (111) "rushing out of the bulkhead against the cargo."

Capt. Legge says (73) he "heard the sound of water coming through the hole" and (49) found the hole the second tier down below the top of the cargo; that the water was squirting out through the rivet hole (51), but part of the rivet was in (37).

The Broken Rivet.

There is a difference between the witnesses as to whether there were one or two rivet heads picked up—and one or two rivet holes which were plugged.

Capt. Legge says (37): "We found water leaking through "a rivet hole * * part of the rivet was in it, the head was "off of it * * (38) found one rivet in that condition * * "(38) I ordered the carpenter to punch it out and put a plug "in to stop the leak * * (48) this broken rivet was on the "port side * * two feet or eighteen inches from the side of "the ship * * (69) about four feet above the floor * * in "a horizontal joint" * * (71) these rivets were 3½" or 4" from center to center and six or eight in the plate—"only one "was broken" * * (74) a chain locker covers 6 or 8 feet of the face of this bulkhead in the middle of it, and * * (75) the broken rivet was 3 or 4 feet from the (port) side of the chain locker. * * (75) He did not remove the cargo on the starboard side of the chain locker so as to examine that side of the bulkhead. He did not see the rivet head picked up (49) but says (48) the carpenter picked it up and passed it to Mate Scott. * * (77) He was not present when the tank was tested in England, and it had never been filled after that test till Sept. 3 (65, 68).

Eng. Keeys says (116) the broken rivet "was about 3 or 4 "feet from the bottom of the tank, *i. e.*, 3 or 4 feet above the "floor of No. 1 hold, and 18 inches to 2 feet from the ship side" * * * (117) There were about 6 other rivets in that same locality; they were 3 to 4 inches apart horizontally and 2 feet vertically from any other seam of rivets * * . (118) That was the only rivet found defective *at that time* * * . (124) The Chief Officer (Scott) took that rivet head. "I saw it picked up; it was found on a bag right under the hole."

The rivet head was produced by Eng. Keeys and marked for identification Ex. 6 (125).

All the rivet holes on that knee-tie were countersunk on the hold side of the bulkhead, and this broken piece indicated it had broken in the countersink (125).

The broken rivet was driven back and a wooden plug put in (115).

The broken rivet was at the extreme end of the knee-tie or gusset (called here the angle-iron), the right angle of which lay at the junction of the stringer which runs fore and aft, one on each side, with the bulkhead so that the broken rivet was towards the centre of the ship (139). Keeys was present at the survey in New York and says (140) there was *another* rivet found gone "next to the one that was gone."

Surveyor Clark (350) examined the C. P. on Sept. 15 and found two rivets out and nine weeping; the holes were plugged with *two pine plugs*, one on the starboard and one on the port side at the angle-iron, in the same horizontal plane, about five feet above the floor, and the port one two and a half feet from the side of the ship, and the (352) starboard one three or four feet from the side * * . (354) Chief Engineer Keeys pulled out the plug * * (352) on the port side. This rivet went through the lap (359) of the bulkhead plates and the angle-iron, *i. e.* (360), through two thicknesses of plates and the angle-iron.

Surveyor Martin (claimant's witness, 268) visited the C. P. on Sept. 11th and 12th. He says (269) he "found one rivet on the "port side at the inner end, that is, towards the centre of the "ship, of the angle-iron connecting the side stringer with the "bulkhead, the head was gone, one rivet next to that was "loose." * * There was no part of the broken rivet in the hole; there was a plug there; *a wooden plug* in the hole. *He* did not remove the plug (270, 271). He also found (271) on the starboard side, corresponding angle, two rivets also leaking, and he counted 11 rivets in bulkhead that were leaking

Surveyor Congdon (claimant's witness) saw (150) the rivets that had been started; *one* was gone * * (158) *i. e.*, partly gone, *part of the iron was still in the hole.* No wooden plugs in * * (164) it was too short to hold a plug * * (151) the after-end was out, the remaining end was in the hole * * a *bolt* was put in there, as temporary repairs. He didn't see the rivet taken out (150) * * (397) and only saw that one.

Surveyor Martin (409), recalled by claimant, said he thought Congdon in error as to the place the rivet head was gone, that he saw the same one, *but not in the place* Mr. C. saw it.

Mate Scott (claimant's witness) says (284) a rivet was out in the tank on the port side * * (285) he could see the water rushing and *drove a plug in* * * (297) there were *two* rivet heads, "*I picked up one and Chief Engineer Keeys picked up the* " *other one* * * (312) The way the water was rushing out I should " say the hole was quite open" * * (314) had two rivet heads in sight. * * Didn't search to find out where other rivet head came from; * * (315) had it fixed in his mind that the rivet head he had came from that hole * * (314) He kept one. Afterwards he doubted whether there was more than one rivet head found (317).

The Rivet Hole was not Fair.

Eng. Keeys examined the rivet head (Ex. 6, produced by him) (125) and (142) declared it was *inferior iron** without fibre, short and brittle, and (144) it was rusted up so you cannot see the fibre, but (145) he could see that it "had been headed " up *one-sided*, that is, the top had not spread evenly over the " portion which had been countersunk" and * * (147) "that " (rivet) would indicate that one end of the rivet had been up " and one *down*."

" Q. *Does that mean that the holes had not been bored true?*"

" A. *That is the exact meaning of it*" (147).

" Q. Did you put the plugs in these holes?"
" A. I was there when *it* was put in."
" Q. Did you see the holes?"
" A. Yes, sir."
" Q. *Did the holes come true?*"
" A. **The holes did not come true; they cut them out so they would come true.**"
" Q. Who did?"
" A. The boilermakers.
" Q. When?"
" A. When the repairs were made."

Surveyor Clark says (350) that he examined the Carib Prince

* Mate Scott said it was fair iron (307). It was mislaid and could not be found at the trial in the District Court.

on Sept. 15th * * (354) that the chief engineer pulled the plug out of * * (352) the rivet hole on the port side * * "*The iron wasn't fair between the two plates*" * * (355) and that he put his finger in the hole * * that the iron on the inside plate was battered * * (353) the hole showed smaller on the inside than it did on the outside * * it didn't appear to be *fair* in the hole between the two plates * * it was out about an eighth of an inch * * (354) it was rounded on the edge of the inner plate * * (358) when I put my finger in, one was little more off on the starboard, the other on the port, inside * *

(356) "Q. How could you tell the extent to which it didn't "fair accurately?"

"A. By my eye."

Saunders [claimant's superintendent] (251) * * (252) did not see the C. P. till January * * (253) *after the temporary bolt had been put in* * * (261) he was not present when the bolt was removed * * * * (259) that bolt ran through the inside end of the angle-iron on the fore and aft stringer on the port side * * (260) he did not have the bolt in his hand * * (261) when he saw it next "the hole was clean; there was nothing in it" * * (262), and he put his finger in the hole and found it fair. * * (263) he did not measure the hole * * (261) the bolt was head side in the tank and nut side in hold No. 1.

Who made the temporary repairs is not shown.

McGowan, foreman of John N. Robbins (379), went *once* to the C. P. and (390) didn't see any plug * * (391), nor bolt, and * * (393) made no particular inspection of the hole where the rivet was missing * * (396) one rivet was out while he was there (but it could not be the plugged one, for) * * (386) the countersink was off, nothing but the head hanging on, and * * (381) that was on the starboard side. * * (389) on the athwart ship bar * * (394), not on the extreme end of the gusset plate.

* * (385) He went alone * * once * *; didn't have his time book in court, and couldn't fix the date; (389) he didn't go inside the tank. * * (391).

The men who made the repairs were not produced.

The Rivet Hole was Bad and Weakened the Rivet.

It was shown by Eng. Keeys (147) that the holes in the plate and angle-iron had not been punched true, and (148) had to be cut out when the boilermakers made the repairs, and it was shown by the rivet-head itself (145) that it was headed up one sided, and by Inspector Clark that the hole, both to the eye (356) and touch (355), showed that the plates did not fair (352) and had been battered (355) * * (353) and the holes were out of line about one-eighth of an inch.

Expert Quinn testified (371) that putting the rivet in a hole $\frac{1}{16}$ to $\frac{1}{8}$ of an inch out of line weakened the strength of the rivet one-third; that 6,000 pounds would be the normal strength of a $\frac{3}{4}$ rivet, and says (370): "If a rivet is driven in at an angle, it "has not the same strength as a rivet driven through a fair "hole."

Note.—There is no contradiction of Quinn.

Claimant's witnesses (examined under the English Commission)—who were Short, the builder (169), Wooland, the foreman riveter (185), Sharp, Lloyd's surveyor (219), James, the naval architect (235) and Lynn, his inspector (204) all concur in saying that if the holes do not fair they should be *rimed* out. Short, 180, Wooland, 198, Sharp, 230, James, 246, Lynn, 215.

They also all concur in saying that the *drift-iron* was used on this tank bulkhead. Short, 176, Wooland, 193, Sharp, 226, James, 242, Lynn, 210.

The drift-pin is described by Quinn (339), and its use is to *upset* the holes when they are not fair so as to get the rivet in *at some angle.*

Quinn described (364) the effect of not fairing of the rivet holes: that in *pinning* (*i. e.*, with drift-pins) the gusset plate (knee-tie) to the side of the ship and rivetting the bulkhead by the angle iron to the gusset plate would put a strain on either the bulkhead or ship's side.

A model was put in evidence showing the form of putting together (375, 376) which Martin said was correct (276).

Martin (claimant's witness) said (277) that two angle-irons, one on each side of the knee-tie, are more common.

The Quality of Iron of the Rivet.

James, the architect, produced (250) an extract from the specifications, Ex. A (463), and this showed (466) the rivets were "to be of iron of *good* quality, to owners' approval."

No evidence of any test or examination of the rivets or of their quality was given.

Short, the builder, testified (171) these rivets were procured from Tyzack & Co. and that rivets from that firm "*are usually* "*tested by bending them when cold and flattening them*" * * (172) "I do not remember testing any particular rivets in that "bulkhead."

No careful watch was kept on the riveting as it proceeded. Short (171, 175) exercised a *general* supervision but did not see any of the rivets inserted in the rivet holes in the fore tank (179).

Wooland, the foreman (192) was constantly going backwards and forwards *superintending* **all** *the work* and * * (198) cannot say how many rivet holes in that fore tank he saw faired; those that required to be rimed would be rimed, but cannot exactly say the number * * (199). "The holes that "were not properly in line had to be faired. I found when the "bulkhead is complete, *there were very few rimed holes.* If "a hole is rimed we put a bigger sized rivet into it * * (200), "I gave a *general, usual and careful supervision* to the rivet-"ing of the fore tank. *I was there as often as I could possibly* "*get*" * * (186) The workmen were first-class men * * "we always employ the same set of men for water-tight work. "*It is important in this work* that we should get the best skill "we can."

> *Note.*—It is obvious that a large body of water in the *inside* of this ship was a constant peril to the cargo, and the need of extreme precautions was measured by the danger. Yet the rivet head produced showed that careless work had been done which escaped detection.

Claimant's counsel attempted to raise *a theory* of crystalliz-

ation of the iron of the rivet by too much hammering and Eng. Keeys was his only witness in support of this theory (143). He said the condition of the fibre of the iron *might* be produced by too much hammering. Builder Short (179), foreman Wooland (195), Surveyor Sharp (228), Architect James (244) and Surveyor Lynn (212) all say that these *three-quarter rivets were all headed hot—that it is impossible with that size to head them cold, and that there is no danger of too much hammering.*

Wooland (195) says: "In water-tight work it is never done cold * * with a rivet of that size it would be practically *impossible* to knock it down cold" and (201) "I never saw a "heated rivet hammered too much. *The thing* is to get them "to hammer it sufficiently. We have to watch them to see "that they hammer it properly."

Quinn says (343) that if driven too cold and it crystallized it would break *in the centre* "and both pieces remain in the holes."

In this case the clinch or head came off at the countersink on the hold side of the collision bulkhead.

Filling the Ballast Tank at Sea.

In order to get under cover of the Harter Act, the claimant alleges in his answers (13, 513, 554, 587) that the damage was due to "some error or fault in the management or navigation of "the vessel in filling the said peak tank on the voyage."

In support of this defense claimant did not ask one word about what happened at the filling of the tank of either Capt. Legge or Engineer Keeys (who were both examined as libellants' witnesses before answers were filed, but Capt. Legge recalled long after).

Capt. Legge said (66) there had been no rough weather from the time of leaving up to discovering the water in the hold.

Mate Scott says (304): "Q. What was the condition of the "weather and wind during that time (*i. e.* while filling tank)? "A. Fine weather. * *. (305) The ship was not stopped; "it took five or six hours to fill it" and (305) repeats it was "Fine weather."

Scott was not asked anything as to the propriety of filling the tank in that kind of weather, and obviously the claimant's

counsel didn't want what those on the ship could tell, and preferred to leave the matter in the realm of conjecture.

It must be remembered that this bulkhead was the *collision* bulkhead, intended to protect the hold from the very danger of water filling this fore peak, and worthless if not secure enough to stand the pressure of water in it.

By the specification, Ex. A, (467) it was to be "*additionally strengthened to owners' satisfaction*," but no evidence exists that it was.

Saunders, the claimant's superintendent (251), starts off the game by saying (258) it was *not prudent* to fill the tank at sea without stopping; at 415 he speaks of Capt. Legge as having a first class certificate as master mariner, and claimant's counsel, desiring to maintain Capt. Legge as a *competent* master, makes Saunders say: "Q. Your criticism of him relates solely to the "filling of the tank on this particular occasion? A. Yes."

Martin (engineer and surveyor) also said (271) it was not prudent to fill the tank without stopping.

Congdon (recalled) (397) also declared it was very unwise to fill the tank at sea, but (404) limited his opinion by adding that if the water is perfectly smooth it wouldn't hurt.

The vessel was, by Capt. Legge's confession, not in proper trim, when she left Grenada only three days before, and was, therefore, unseaworthy in this respect, or unseaworthy by reason of her captain being incompetent.

No evidence was given as to the sufficiency of the bulkhead to stand the expected strains, but Quinn (365) enumerated the various causes why the rivet head would break, viz.: (1) badly fitted gusset plate; (2) holes not punched fair; (3, fol. 368) insufficient bracing in centre of bulkhead; (4) crystallization of rivet or hammering on it while cold; (5, fol. 369) inferior iron; (6) extra pressure on a full tank.

Of the above causes but *one sufficient* one was proved, viz. the rivet holes were not fair, as was shown by Engineer Keeys (147 to 149) and Inspector Clark (352 to 359).

No one disputes their evidence. The rivet Congdon saw broken was only partly gone, and was on the vertical bar (163). Martin did not have the wooden plug withdrawn (270) nor ex-

amine the hole (271), and saw a different rivet from Congdon's (410). Saunders did not see the Carib Prince till January (252), and then the bolt, with nut on hold side and head on tank side, was in place (260 to 262) and had been got in as Keeys says *by cutting the holes true* (148).

This broken rivet was at the extreme inner end of the gusset or knee-tie (Martin 269) on the port side and would take the greatest strain from the use of drift pins; the rivets nearer the side of the ship feeling less pull, as they would be nearer the point of least motion. The weakest part would be the first to go, and then the rest of the rivets would take, not only their own prior share of the general strain, but the added amount due to reducing the effective number.

In other words, if five men are holding a certain weight or resisting a certain tension, and one gives out, the burden of the other four is increased, and if the five were just equal to the burden, the loss of one means the breakdown of all.

The surplus of strength is the factor of safety, and the closer the strain is to the endurance the less the factor becomes.

The August Hurricane.

In order to account for the broken rivet, claimants have presented several different theories and among others they have asked the Court to believe that the vessel was severely strained in the hurricane of August 20th, 1893, and Capt. Legge says (64) that in the ten years of his trading in the West Indies he never saw a worse one. The log entries of both mate (57 to 62) and engineer (127) were offered and show terrific seas and use of oil, vessel hove to (58 to 61) and great straining of vessel.

Of course this strain on the vessel ought to have been the occasion of a most solicitous examination and inquiry, made with all known tests—*one of which and a very simple one would have been to fill this fore peak tank* and use the hammer test on the rivets. *But nothing of the kind was done.*

Capt. Legge says (67) he never was inside the tank—and that (67, 78) it was never filled from the time it was tested by the builders until Sept. 3.

Eng. Keeys says (129) that on August 22 (134), after the hurricane he went down into the tank * * (130) "*not for a*

"*practical examination*," * * just to satisfy myself—to "have a look at the formation of the tank principally. It "was the first time I had seen it; * * (134) the vessel was "then at sea" * * he went alone; * * (135) he found no *appearance* of any starting of the cement * * (142) and confined his examination entirely to the tank side and did not go into No. 1 hold, even after the cargo had been delivered (132).

Capt. Legge says (65, 78) the only examination, after the hurricane, of this tank bulkhead was that of Eng. Keeys and that he made no report about it to him.

Mate Scott says (296) no particular examination was made (294). The hammer test was made on the inspection in England. Sharp (222) Wooland (187) Short (173) James (237).

Why the Cargo was Damaged.

That four feet of water (283, 113, 331) was found in No. 1 hold—which got there through a rivet hole three quarters of an inch in diameter (51) in which the broken rivet remained (37)—shows that this small stream had been pouring in for many hours—and confirms (if confirmation were needed) the log and Capt. Legge and Eng. Keeys, who say the tank was filled on Sept. 3d at 10 P. M. and the leak discovered on Sept. 5 at 6 A. M., a period of 32 hours (80, 107).

The Tight Limbers.

The reason it accumulated to such an extent, and was not discovered when the wells were sounded, was that the floor of this hold was caulked (Legge, 29, 30, 43) and *the limbers on top of the bilges were fitted so tight that no water passed into the bilges.*

Capt. Legge says (34) he had the cargo moved from the sides of the ship so as to get at the limber boards "*so as to allow the* "*water to get into the bilges* and be pumped out through the "engines" and * * (36) after moving the cargo "*we bored* "*holes to let the water go through*" and (37) "Q. Until you "bored these holes the water stayed there? A. Yes, sir."

Note.—The sounding well for this hold was close to the after bulkhead (329, 330), and if the water could have got

through the limbers, it would have shown in the bilges, which, however, did not show any (291) when the holds were sounded night and morning on Sept. 4 (289), as only an inch or two (325) was found, which is the usual quantity, and couldn't be pumped closer (337, 291). Capt. Legge says (36, 43) the sluices between the bilges and engine room are always kept open. Eng. Keeys was not asked, although he would certainly have known. Mate Scott denied it (288).

Carpenter Hopkins says (331) that the water in this hold was up to his knee when standing on the dunnage * * (332) he bored five three-quarter inch holes through the limbers on each side of the ship, all *at the after end* close together.

Mate Scott says (286) he shifted the cargo in the wings and *got the* limber boards up in the after end. "Q. Did you get "them up? A. No; we couldn't get the back one up, *but we* "*cut through* to let the water run down to the strum boxes" (*i. e.*, the strainer in the bilge, 286).

Capt. Legge says (45) that the limbers were not raised at all, and (46) when they got to New York they came out "*hard;* "*had to pry them open with a bar.*"

Surveyor Congdon says (407) the limbers are boards covering the water course and should always be made so as to lift out, and he had seen thousands and had never seen them so tight that they would not lift out—that (406) the purpose of the bilges is to make a water course in the ship, to keep the holds dry and the cargo from being damaged by an accumulation of water.

Capt. Legge says (25) the bilges in No. 1 hold would be 18 inches wide * * (24) that there is a tank runs the entire length of the vessel, divided by the bulkheads, the sides of the tank and the sides of the ship making the bilges, which are triangular spaces * * (41) two feet deep in No. 1 hold aft and 15 to 18 inches forward.

It is obvious this bilge space would contain a large body of water which ought to have run through the sluices and shown in the well when sounded, but that it did neither is certain *and proves how absolutely useless the bilges were made by the tight limbers.*

The Defences.

The bill of lading contains exceptions not mentioned in the charter party, among others, "*latent defects in hull*" (430), and the preliminary question, *when the vessel is sued*, is, can she avoid the express warranty of being tight, staunch and strong, contained in her charter (438), by claiming the benefit of this bill of lading clause, when the charter (Art. 18, 450) limits the clauses the charterer is to put in the bill of lading to the "*usual negligence clause.*"

Evidently the shipper is entitled to the benefit of the warranty of the charter.

N. J. St. Nav, Co. *vs.* **Mech. Bk.,** 6 How., 378. In that case the expressman had a contract with the ship-owner, and the court held the owner of the property shipped could maintain an action *in admirally* on that contract, or have the benefit of it.

The Latent Defect Clause.

But if the ship owner can avail himself of the "latent defect" clause of the bill of lading, it does not operate to limit the warranty of seaworthiness.

The question is settled by the construction given in the **Caledonia**, 50 F. R., 567, by the Circuit Court, 43 F. R., 685, and by the U. S. Supreme Court to almost identical words.

Gray, *J.:* "In the case at bar the unseaworthiness of the "vessel consisted in the unfitness of her shaft when she left "port, and that unseaworthiness was the cause of the damage "to libellant's cattle. The exception of 'steam boilers and "machinery or *defects*' therein, inserted in an instrument "framed by the ship owners and in the midst of a long enumera-"tion of various causes of damage, all the rest of which relate "to matters happening *after the beginning of the voyage*, must, "by elementary rules of construction and according to the "great weight of authority, be held to be equally limited in its "scope *and not to affect the warranty of seaworthiness at the "time of leaving port upon her voyage.*"

In affirming this case on March 11, 1895, the U. S. Supreme Court, speaking by Fuller, *J.*, said:

"As is well said by counsel for appellee, the exceptions in a "contract of carriage limit the liability, *but not the duty*, of the "owner, and do not, in the *absence* of an *express* provision, pro- "tect the shipowner against the consequences of furnishing an "unseaworthy vessel. *If the exceptions are capable of, they "ought to receive*, to use the language of Lord Selborne in "Steele *vs.* S. S. Co. (3 Ap. C., 72), '*a construction not nulli-* "'*fying and destroying the implied obligation of the ship-* "'*owner to provide a ship proper for the performance of the* "'*duty which he has undertaken.*' There was no exception in "this bill of lading which *in express words* exempted the ship- "owner from furnishing a seaworthy vessel at the commence- "ment of the voyage. As the exceptions were introduced by the "shipowners themselves, in their own favor, they are to be con- "strued most strongly against them, *and we perceive no reason "why the obligation to furnish a seaworthy vessel should be "held to have been contracted away by implication.*

"*Their meaning ought not to be extended to give the ship- "owner a protection, which, if intended,* **should have "been expressed in clear terms.**"

The above language of Judge Fuller may be re-enforced by that of Lord Penzance in **The Quebec Ins. Co.** *vs.* **Bank,** L. R. 3, P. C. 242, where he said: "It is said that the language of "the policy is such, that the Court ought not to imply there- "from the ordinary warranty of seaworthiness. No doubt it is "competent to parties by language in a contract to which, as "an ordinary rule, the law applies some implied condition, *by "express, pertinent and apposite language* to exclude that "condition, and the question in this case is, whether the parties "have done so? This, like all questions of contracts, is a "question of the intention of the parties. The law by which "the warranty of seaworthiness is attached to the contract is a "law known to the parties who make contracts of this descrip- "tion, and therefore they are prepared to understand that the "implied warranty will be attached to the contract they are "about to make. *If, therefore, there is an intention to exclude "that implied warranty, it ought to be expressed in plain "language.*"

The defect in the Caledonia was a latent defect in her shaft, and the words of the bills of lading in that and this case are here set side by side.

CALEDONIA.

"The act of God, the Queen's enemies, pirates, restraint of princes and rulers, perils of the seas, rivers, navigation and land transit, of whatever nature or kind, restrictions at port of discharge, loss or damage from delays, collision, straining, explosion, heat, fire, *steam boilers and machinery or defects therein*, negligence, default or error in judgment of pilots, master, mariners, engineers, stevedores or any other person in the employ of the steamship, or of the owners or their agents *excepted*."

CARIB PRINCE (fol. 430).

"The act of God, the Queen's enemies, pirates, robbers, restraints of princes, rulers and people, loss or damage from heat or fire, on board, in hulk or craft or on shore, explosion, steam, *accidents to or latent defects in hull*, tackle, boilers and machinery, or their appurtenances, jettison, barratry, any act, neglect or default whatsoever of pilots, masters or crew in the management or navigation of the ship, quarantine, collision, stranding and all and every other dangers and accidents of the seas, rivers or steam navigation of whatsoever nature or kind always *excepted*."

In the District Court claimants' counsel contended that the addition of the *limiting* word "latent" to the C. P. bill of lading distinguished it from the Caledonia and made the latter case inapplicable. The force of this reasoning is that while the greater includes the less, the less is no part of the greater. If the *latent* defect in the shaft of the Caledonia was not a "defect," because it was latent, such argument might prevail.

In the Caledonia Judge Fuller further said "moreover the "words 'delays, steam boilers and machinery or defects "'therein' formed a part of a long enumeration of the causes "of damage *all the rest of which related to matters subsequent* "*to the beginning of the voyage*, and, by another familiar rule "of construction, they should be treated as equally limited in "their scope." * * "We are not dealing with the question "of how far exceptions may be given effect in particular cases, "but whether by those under consideration, claimants were "exempted from liability for unseaworthiness *and we are* "*clearly of opinion that they were not.*"

But the defect in this rivet-hole **was not latent.** It was patent to the man that put the rivet in, who had to use the drift-pin to get it in on an angle, and would be equally patent to every one who took the trouble *to examine the* **hole.**

If the iron of the rivet was bad, that could have been discovered by testing and no test was made.

If the theory (in support of which there is absolutely no proof) that it became crystallized by hammering, is accepted, then the too great hammering ought to have been avoided and prevented.

The Warranty of Seaworthiness.

In the **Hadji,** 20 F. R., 878, Wallace, *J.*, said: "It is the "*first* duty of a common carrier by water, to provide a vessel "tight, staunch and fit for the employment for which he holds "it out to the public."

"*The breach of this duty is the* **personal** *default of the* "*shipowner.*"

In **Bowring vs. Thebaud,** 56 F. R., 524, Wallace, *J.*, said: "The warranty that the vessel is tight and fit for the "employment for which she is offered, that is for the contem-"plated voyage on which she is to carry cargo, *is the very* "*foundation and substratum of the contract of carriage.*"

This "warranty of seaworthiness" implied by law in the contract of carriage is equally implied in the contract of insurance, and in the latter is the *condition precedent* to the insurance taking effect.

Maclachlan Mcht. Shpg., 418, "As the strictness "looked for in fulfilling a warranty is required here, his care "should carry him *as far as the carrier's contract requires him* "*to go, and further than that,* even to the letter of the, law in "its exactions under the insurer's contract."

The Quebec M. I. Co. *vs.* The Com. Bk. L. R., 3 P. C., 243, Lord Penzance: "It would seem, therefore, an odd conclusion "to come to, to say that * * the Underwriters * * should "have intended to surrender the warranty of seaworthiness "*which, after all, is the main protection to their interests.*"

2 Arnould M. Ins., 649 (6 ed.): "There is nothing in the law of "marine insurance more important to commerce and the preser-"vation of human life than this warranty" (of seaworthiness).

It follows that if the carrier may by contract relieve himself from the warranty of seaworthiness and have the right to

substitute for a seaworthy vessel, one that he believes to be seaworthy, or has used diligence to make seaworthy, but which in fact is not seaworthy, the shipper can obtain no insurance for his goods, and the anomaly in the law exists that it requires the insurer to provide a seaworthy vessel, and allows the carrier to furnish one that is not so.

This is pointed out in the opinion of Mr. Justice Fuller in the **Caledonia** (11 March, 1895), where he quotes from the decision in the Eugene Vesta, 28 F. R., 762, by Mr. Justice Brown as follows:

"*The theory of the law is that the implied warranty of "seaworthiness, shall protect the owner of the cargo until his "policy of insurance commences to run.*"

And Judge Fuller also quotes the words of Field, *J.*, in Cohn *vs.* Davidson, 2 Q. B. D., 455, who said: "No degree of sea- "worthiness for the voyage, at any time anterior to the com- "mencement of the risk, will be of any avail to the assured "unless the seaworthiness existed at the time of sailing from "the port of loading. *As therefore the merchant*, in a case "like the present, *would not be entitled to recover against his "underwriter by reason of the breach of the warranty in sail- "ing in an unseaworthy ship*, it would follow that, if the "warranty to be implied on the part of the ship-owner is to be "exhausted, by his having the ship seaworthy at an anterior "period *the merchant would lose that complete indemnity, by "means of the two contracts taken together, which it is the "universal habit and practice of mercantile men, to endeavor "to procure.*"

When it is further considered that the reason of the implied warranty is "that it takes away all temptation to expose "life and property to the dangers of the seas in vessels not fit "to encounter them" (per Curtis, *J.*, in Bullard *vs.* Roger W. Ins. Co, 1 Curt., 155) and that "every relaxation of the com- "mon law in relation to the duties and responsibilities of the "owners of carrier ships *is founded in bad policy* and detri- "mental to the general interests of commerce" (per Story, *J.*, in the Sch. Reeside, 2 Sum., 575), or as it is put by Freedman, *J.*, in Rogers *vs.* Sun. Mu. Ins. Co., 46 Supr. Crt., 65: "The rule "of seaworthiness may in some instances act as a harsh one, *but*

"*it is a reasonable and salutary one, and public policy is* "against *its relaxation in favor of the owner because upon its* "*enforcement depends in a great degree the safety of the crew* "*and passengers*;" it is evident that the law, which has imposed this warranty on the business of carriage by sea, will not permit it to be frittered away by subtleties and nice distinctions; and it would not be going too far to say that it is *incompetent* for the ship-owner to relieve himself from it at all.

Such was the conclusion reached in 1838 by Cowen, *J.*, in Cole *vs.* Goodwin (19 Wend., 251), where, at p. 281, he says: "Admit- "ting that the plaintiff *acceded* in the clearest manner to the "proposition in the notice that his baggage should be carried "on the terms mentioned, *I think the contract thus made was* "*void on his part as contrary to the plainest principles of pub-* "*lic policy.*"

In Gould *vs.* Hill (1842), 2 Hill, 633, Judge Cowen followed this dictum by a direct decision in which he cited and followed Judge Story in the Reeside, above quoted from.

It is to be noted that Judge Nelson dissented, and in N. J. St. Nav. Co., *vs.* Mech. Bk., 6 How., 382, in 1847, he gave his reasons: "*As the extraordinary duties annexed to his em-* "*ployment concern only in the particular instance the parties* "*to the transaction, involving simple rights of property*, the "safe custody and delivery of the goods, we are unable to per- "ceive any well founded objection to the restriction, *or any* "*stronger reason forbidding it than exists in the case of any* "*other insurer of goods*—to which his obligation is analogous, "and which depends altogether upon the contract between the "parties."

It is submitted that the above remarks are *obiter* as to the present question, and the reasons given are unfortunate and inapplicable. There is no *duty* on an underwriter to insure, and he may refuse to contract, or limit his insurance as he pleases; but the carrier cannot legally refuse to carry, and the question is, *may he contract to carry at the shipper's risk in an unseaworthy vessel?*

This distinction is pointed out by Bronson, *J*, in Wells *vs.* Nav. Co., 2 N. Y., 209, where he said: "It is, perhaps, a "debatable question whether common carriers and inn keepers "*can contract* for a more restricted liability than the law

"imposes upon them in the absence of a special agreement. "But there is no room for doubt that other bailees and persons "engaged in other employments may contract for either a "larger or a more restricted liability than would be implied "against them in the absence of a special contract. *They are "not like common carriers bound to accept employment when "offered, nor like them, tied down to a reasonable reward for "their services.* They are at liberty to demand an unrea- "sonable price before they will undertake any work or trust, or "to reject employment altogether, and they may make just "such stipulations as they please concerning the risk to be "incurred."

The Laertes, 12 P. D., 187. There were three bills of lading containing different wording, viz.:

1. Warranted seaworthy only so far as *ordinary* care can provide.
2. Warranted seaworthy only as far as *due* care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers and crew can ensure it.
3. Owners not to be liable for loss, if arising from *latent* defects in boilers, machinery, **even existing at time of shipment** (note the words).

The vessel became unseaworthy by a latent defect in her flywheel and was towed by another vessel belonging to the same owners, and her cargo libelled for salvage.

Butt, *J.* (188), said: "The flaw in the shafting which led to "the breakdown *existed when the ship started*, and therefore "she was not seaworthy for the voyage. If the implied war- "ranty existed or was not limited by the contract in the bill of "lading, then the owners of the Laertes, being also the owners "of the Achilles, could not sue as salvors."

Overruling the contention that the bills of lading did not limit the warranty of seaworthiness, Judge Butt said: "I think "the exception (above set out) in the third bill of lading, *if it "does not abrogate, at all events limits, the warranty which "the law would otherwise imply, that the ship was seaworthy "at the beginning of the voyage.*"

And thereupon the Court awarded £1,200 salvage against this cargo *and gave £900 of it to the owner of the unseaworthy ship.*

But one step further is necessary and that is to allow the

warranty to be absolutely abrogated by contract and allow the carrier who knows that his vessel is unseaworthy to recover salvage, and then he will prepare in advance to earn it by sending out the rescuer with the doomed vessel.

The Harter Act.

Ch. 105, Acts of 1893, p. 445.

The claimant does not specifically plead this act but alleges *due diligence* to make the vessel seaworthy (13) and in the District Court his counsel claimed its benefit.

The charter party contracts for a vessel tight, staunch and strong and this has been held to mean an absolute warranty that she is so and not that the owner will use due diligence to make her so.

The E. I. Morrison, 153 U. S., 199.
The Caledonia, 156 U. S.

If under the Harter Act the shipowner is permitted to escape liability when he has used due diligence, there is certainly nothing to prevent him contracting that his vessel is and shall be seaworthy, and not merely that he will try and make her so. In other words he may by contract agree to waive all benefit of any exemptions the law would give him.

Does the Harter Act apply?

This English vessel claims to be protected by an act of Congress which by § 5 imposes a penalty of $2,000 "for a violation " of any of the provisions of this act."

And by § 1 forbids the insertion of clauses in any bill of lading whereby negligence is excepted, which exception is valid by the law of England.

This is obviously *domestic* legislation, yet in the Etona, 64 F. R., 882, Judge Brown held it applied to foreign vessels, saying: "Under the explicit language of the third section of the " act of February 13, 1893, which extends its provisions to 'any " 'vessel transporting merchandise or property to or from any " 'port in the United States,' I do not feel authorized to limit " its application to vessels of the United States alone."

The Construction to be Given.

The Main vs. Williams, 152 U. S., 132. "The English "courts have held, *very properly we think*, that these statutes "should be strictly construed. As observed by Abbott, "*C. J.*, in Gale *vs.* Laurie, 5 B. & C., 156, 164: 'Their "'effect, however, is to take away or abridge the right of "'recovering damages, enjoyed by the subjects of this country "'at the common law, and *there is nothing to require a con-*"'*struction more favorable to the ship-owner than the plain* "'*meaning of the word imports.*' To the same effect are the "remarks of Sir Robert Phillimore in The Andalusia, 3 P. D., "182, 190, and in The Northumbria, L. R. 3 Ad & Ec., 6, 13. "Speaking of this statute, Lord Justice Brett, in Chapman *vs.* "Royal Netherlands Nav. Co., 4 P. D., 157, 184, remarked: "'A statute for the purposes of public policy, *derogating, to the* "'*extent of injustice*, from the legal rights of individual parties, "'should be so construed as to do the least possible injustice. "'This statute, whenever applied, must derogate from the direct "'right of the ship owner against the other ship-owner. * * * "'It should be so construed as to derogate as little as is possible, "'consistently with its phraseology, from the otherwise legal "'rights of the parties.'

"While, from the universal habit of insuring vessels, the "application of the statute probably results but rarely in an "actual injustice to the owner of the injured vessel, yet, being "in derogation of the common law, we think the court should "not limit the right of the injured party to a recovery beyond "what is necessary to effectuate the purposes of Congress."

It would seem reasonable, that if Congress intended to radically change the common law, which had its source in the public policy declared by courts to be the basis of the common carriers responsibility, it should do so in unmistakable language; and that before a court should be required to abandon rules which have been declared to be of such high import in commercial dealings *and matters of paramount public interest*, they should have the instructions to do so in terms of no doubtful meaning.

§ **3** of the Harter act provides:

"That if the owner of any vessel transporting merchandise or "property to or from any port in the U. S. of Am. shall exer-

" cise *due diligence* to make the said vessel in all respects sea-
" worthy and properly manned, equipped and supplied, neither
" the vessel, her owners, agent or charterer shall be held responsi-
" ble for damage or loss **resulting** *from faults or errors of*
" *navigation or in the management of said vessel.* * *

Note.—The above language must be carefully considered. There is not one word in it, which, by any construction can be said to diminish the obligation to furnish a seaworthy vessel. Certain damages are specified, *resulting* not from unseaworthiness but from faulty navigation or management, from which the owners are conditionally absolved ; but, it is a familiar rule that if the accident would not have happened to a seaworthy vessel the owner is still liable even if he has excepted the cause of damage.

If therefore the Carib Prince's bulkhead gave way from two concurrent causes, one its bad construction and the other the alleged bad management in filling it at sea, the statute will not avail the claimant.

"Nor shall the vessel, her owner or owners, charterers, agent
" or *master* be held liable for losses arising from dangers of the
" sea or other navigable waters, acts of God or public enemies,
" or the inherent defect, quality or vice of the *thing carried* * *

Note.—The vice of the ship is not mentioned.

" or from insufficiency of package or seizure under legal process,
" or loss resulting from any act or omission of the shipper, or
" owner of the goods, his agent or representative, or from
" saving or attempting to save life or property at sea, or from
" any deviation in rendering such service."

All the above enumerations of exemptions, is dependent on the conditional "if," and the careful reader of the section will see that no definition of the "due diligence" required, as the operative condition is given.

What is Due Diligence?

"There are infinite shades of care or diligence from the
" slightest momentary thought or transient glance of attention
" to the most vigilant anxiety and solicitude."

Story on Bail, § 11.

§ 3 of the act is not the only one in which the words "due diligence" are used, for in § 2 is the prohibition "to insert in "any bill of lading any covenant whereby the **obligations** "of the owner to exercise **due diligence** (*sic*) properly equip, "man, provision *and* outfit said vessel *and* to make said vessel "seaworthy * * **shall in any wise be lessened, "weakened or avoided.**"

> *Note.*—When Congress here used the word "obligations" it did not define them, but referred to the well known and fixed duties, and when it declared that such *obligations* should not by any covenant be *lessened, weakened or avoided*, it gave full effect to the *existing recognized obligations.*

But the existing obligation of the ship-owner was to furnish an absolutely seaworthy vessel, and if it was not to be weakened, the sentence quoted from Art. 2 should be divided into two heads:

(1.) The obligation of the owner to exercise *due diligence* to properly equip, man, provision and outfit said vessel.
(2.) The obligation to make said vessel seaworthy.

This distinction has been recognized by the courts.

They say the warranty of seaworthiness is *absolute*, and they also say that the duty to carefully stow cargo is limited to *due* diligence.

Lawrence vs. **Minturn,** 17 How., 115. Curtis, *J.*: "The master is bound to use *due diligence and skill in stow-* "*ing and staying the cargo*, but there is no absolute warranty "that what is done shall prove sufficient."

The grammatical construction of § 2 bears out the above contention. The conjunction, "*and*" is used twice in the sentence, "whereby the obligations" (*note the plural*) "of the owner or "owners of said vessel to exercise due diligence, properly "equip, man, provision *and* outfit said vessel, *and* to make said "vessel seaworthy."

The substantive "*obligations*" is governed by the verbs "*to exercise*" and "*to make*," coupled by the second "and" while the first "and" connecting the words "provision" and "outfit" make them relate back to the "*due diligence.*" The use of the word "properly" also confirms this; it qualifies the

"*due diligence*" and explains that it applies to each of the items, equip, man, provision, outfit; but it has no application to the "*make said vessel seaworthy*," which is left, as before, an absolute obligation.*

Full force must be given to the words, "*in anywise be lessened, weakened or avoided*" in § 2.

It is plain that Congress was dealing with a well defined *obligation*, and one whose degree of binding force it declared should not be "lessened, weakened or avoided" and this could only be done by keeping it exactly as it then existed.

If the words "*due diligence*" be taken to apply to seaworthiness, they must be interpreted, in order not to lessen or weaken the obligation, to mean that the same degree of responsibility for seaworthiness still attaches to the carrier as before the act was passed.

The Obligations of Common Carriers.

Liverpool Steam Co. vs. Phenix Ins. Co., 129 U. S., 440, Gray, *J.*, reviewed *Railroad Co.* vs. *Lockwood*, 17 Wall. 357, and analyzed its conclusions, as follows:

> "The employment of a common carrier is a public one, "charging him with the *duty* of accommodating the pub- "lic in the line of his employment. A common carrier is "such by virtue of his occupation, not by virtue of the re- "sponsibilities under which he rests. Even if the extent "of these responsibilities *is restricted by law* or by con- "tract, the nature of his contract makes him a common "carrier still. * * * * The fundamental *principle* upon "which the law of common carriers was established, was "to secure the *utmost* care and diligence in the perform- "ance of their duties. *That end was effected, in regard "to goods, by charging the common carrier as an insurer*, "and in regard to passengers, by exacting the *highest* de- "gree of carefulness and diligence. A carrier who stipu- "lates not to be bound to the exercise of care and dili- "gence, seeks to put off the *essential duties* of his employ- "ment. * * * * The law demands of the carrier careful-

* The "properly" in § 3 is immediately followed by "manned," showing that it was intended to qualify each of the three words—expressed in different order in § 2.

"ness and diligence in performing the service; *not merely* "*an abstract carefulness and diligence in proprietors and* "*stockholders who take no active part in the business.* To "admit such a distinction in the law of common carriers, "as the business is now carried on, would be subversive of "the very object of the law."*

"The carrier and his customer do not stand upon a foot- "ing of equality. The individual customer has no real "freedom of choice. He cannot afford to higgle or stand out, "and seek redress in the courts. He prefers rather to ac- "cept any bill of lading, or to sign any papers that the "carrier presents; and in most cases he has no alternative "but to do this or to abandon his business. * * * * "*It being against the policy of the law* to allow stipula- "tions which *will relieve the railroad company from the* "*exercise of care or diligence*, or which, in other words, "will excuse it for negligence in the performance of its duty, "the company remains liable for such negligence."

"This analysis of the opinion in Railroad Co. *v.* Lock- "wood shows that it affirms and rests upon the doctrine "that an *express* stipulation by ANY common carrier for "hire, in a contract of carriage, that he shall be exempt "from liability or losses caused by the negligence of himself "or his servants is unreasonable and *contrary to public* "*policy* and consequently void."

Note that the Court says that "*the fundamental principle* "upon which the law of common carriers was established was "*to secure the utmost care and diligence* in the performance of "their duties." This was a declaration of a purpose. Then followed this language: "That end was effected, in regard to "goods, by charging the common carrier *as an insurer*, and, in "regard to passengers, by exacting the *highest* degree of care- "fulnesss and diligence."

What is "due diligence," in its application to the duty of a carrier to make his vessel seaworthy?

Is it to be held to be something less than the obligation, as

* Note Judge Wallace's expression in The Hadji, 20 F. R., 878, where he says "The breach of this duty is the *personal* default of the shipowner."

insurer, which, as quoted from the case cited above, is based upon a "*fundamental principle*" and "was to secure the utmost care and diligence in the performance of their duties." As already shown by that case, the "*fundamental principle*" was worked out by charging the common carrier of goods, as insurer, and the carrier of passengers was held to the *highest* degree of carefulness and diligence.

In Penn. Co. vs. Roy, 102 U. S., 455,

the Court was dealing with a carrier of passengers, and Judge Harlan said:

> "Those thus engaged are under an obligation arising out "of the nature of their employment, *and on grounds of* "*public policy*, vigorously enforced, to provide for the "safety of passengers whom they have assumed, for hire, "to carry from one place to another."

And again at page 456 he said:

> "He is responsible for injuries received by passengers in "the course of their transportation which might have been "avoided or guarded against by the exercise upon his part "of *extraordinary vigilance aided by the highest skill*, "and this caution and vigilance must necessarily be ex- "tended to all the agencies or means employed by the "carrier in the transportation of his passengers. Among "the duties resting upon him is the important one of "providing cars or vehicles adequate, that is, sufficiently "secure as to strength and other requisites, for the safe "conveyance of passengers. *That duty the law enforces* "*with great strictness;* for the *slightest negligence* or fault "in this regard from which injury results to the passenger "the carrier is liable in damages. These doctrines to which "the courts with few exceptions have given a firm and "steady support, and which *it is neither wise nor just to* "*disturb or question*, would, however, lose much, if not "all, of their practical value, if carriers are permitted to "escape responsibility upon the ground that the cars or "vehicles used by them, and from whose insufficiency in- "jury has resulted to passengers, belong to others."

In Robinson vs. the N. Y. & Cent. R. R. Co., 8 F. R., 877, Judge Wallace had before him the liability of the com-

mon carrier to his passenger, who had been injured by an explosion of the defendant's locomotive and was reviewing the instructions to the jury. He said :

> "They were also instructed that it was incumbent upon
> " the defendant as a passenger carrier to see to it, by *every*
> " test recognized as necessary by experts, that the boiler
> " was in safe condition, but that they were not liable for a
> " defect which *could not be discovered* by such test," and
> he said that this instruction was strictly correct. "It has
> " been frequently declared that the carrier of *passengers*
> " contracts for their safety, as far as human care and fore-
> " sight can go, and *must* adopt **all** the precautions which
> " have been practically tested and are known to be of value
> " and employ all the skill which is possessed by men whose
> " services it is practicable for the carrier to procure. But
> " the instruction was, that the defendant was not exculpa-
> " ted if the defect *could have been discovered* by the appli-
> " cation of **all** tests recognized by the experts as necessary.
> " It surely would not express the true extent of the carrier's
> " liability to say that the carrier is exonerated if the defects
> " could not be discovered by the application of *some* of the
> " tests which experts recognize as necessary. If there was
> " *any* test recognized as necessary, which was not applied,
> " the carrier failed to comply with its obligations."

Apply the above doctrine to the present case, *assuming that the carrier has ceased to be an insurer*, and has become responsible only for *due diligence*, and what answer can the ship-owner make for his failure to apply the test of filling the tank after the hurricane of August 20th, and for his failure to apply the test of tapping the rivets with a hammer or seeing that the limbers were sufficiently open to let the water reach the bilges.

Why, if the collision bulkhead is required to protect the steamer against the peril of water entering the forepeak, in case of collision, which may happen in rough weather, as well as in smooth ; why, I say, should not the strength of that bulkhead be sufficient to stand all strains resulting from partly filling the tank, and why is it not the owner's duty to ascertain that it is strong enough to resist that necessary amount of surging of the water, which must be anticipated, while it is partly filled, after a collision. It is obvious that the tank might not be filled after

a collision, to its full extent, and therefore must be expected to stand the strain of the surge of the water.

Again, this surging of the water in the tank is such an obvious danger, that common prudence would require it to be guarded against. This could be done by the division of the water into small bodies, or by breaking the force of the surge by plates or beams so placed as to act as "breakwaters." If the tank, by reason of its size and the weight of 83 tons of water in it, was exposed to too much force of the surge, the easy remedy was subdivision. The ship-owner took all responsibility for these details and cannot throw off that burden on the innocent cargo-owner.

For the reasons above set forth the decrees should be reversed and the causes remanded to the District Court with instructions to ascertain the amount of the several libellants damages, and enter decrees therefor with costs.

Dated April 5th, 1895.

Respectfully submitted,

GEO. A. BLACK,
Proc. Liblt.

No. 286.

Brief of Putnam for Appt.

Filed Apr. 17, 1897.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896

JOSEPHINE W. WUPPERMAN,
Libellant and Appellant,
against
The Steamship CARIB PRINCE, ERNST LEGGE,
Claimant.

No. 286

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANT

HARRINGTON PUTNAM
Advocate

BLACK & KNEELAND,
Proctors

SUPREME COURT OF THE UNITED STATES.

JOSEPHINE W. WUPPERMAN,
Libellant and Appellant,
AGAINST
The Steamship CARIB PRINCE,
ERNEST LEGGE,
Claimant.
} No. 286.

On *certiorari* to the Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE LIBELLANT AND APPELLANT.

This is a suit in admiralty begun in the District Court of the United States for the Eastern District of New York. Libellant was an owner of cargo carried on the steamship *Carib Prince* in August and September, 1893, from Trinidad to New York. The front or fore peak of the steamer was built as a ballast tank for trimming the vessel. Libellant's cargo was carried in the No. 1 hold, just abaft this tank. On leaving port the tank was empty. Indeed, it had not been filled on any previous voyage. The steamer drew 14 ft. 10 in. forward and 16 ft. 10 in. aft, being two feet by the stern (Legge, 41).

On Sept. 3d, while on the voyage, the master changed the trim so as to bring the ship more by the head and upon an even keel, by filling this fore peak with 83 tons of water. The weather was fine, the ship was not stopped, and the tank was filled at ten o'clock in the evening.

At 6 o'clock in the morning of the fifth of September the ship's carpenter sounded the tank and found it partly empty (Scott 282, Engineer's log, p. 164). Captain Legge first testified that this discovery was made the next morning, *i. e.*, Sept. 4th (47), but after looking at the log, he corrected himself and said that this time since the tank had been filled was 32 hours (80).

The number one hold was found with 3 to 4 feet of water at

the after end and about 8 inches deep at the forward end. The water was heard gurgling in forward. It was spurting out of a rivet hole in the bulkhead with considerable force against the cargo.

This rivet was on the port side about three or four feet from the floor and about two feet or eighteen inches inboard from the ship's side. The rivet end or clinch was found beneath on a bag of cargo; and the other end still in the hole, was driven back into the tank and a wooden plug inserted.

The rivet hole was countersunk on the hold side of the bulkhead. The rivet passed through the lap of the bulkhead plates, and the transverse angle iron or knee-tie on the forward side of the bulkhead. It was the end of a series which attached this knee tie to the forward side of the bulkhead. The rivet had broken off in the hole. A part of this rivet was marked for identification, but it was mislaid and not found at the trial in the District Court. There is a difference in the testimony as to the quality of the fibre of the rivet itself.

Keeys, the engineer of the vessel, examined the rivet head, and declared that it was inferior iron, without fibre, short and brittle (142, 144). Scott, the mate, said that it was fair iron (307).

The rivet holes in the plates were not true. One orifice being higher than, or at one side of, the other, caused the rivet to be headed up one sided.

Mr. Keeys, the engineer, testified that he could see the rivet had been headed up *one-sided*, that is, the top had not spread evenly over the portion which had been countersunk, and

"that would indicate that one end of rivet had been up and one *down*."

Q. *Does that mean that the holes had not been bored true?* A. *That is the exact meaning of it* (147).

Q. Did you put the plugs in these holes? A. I was there when *it* was put in.

Q. Did you see the holes? A. Yes, sir.

Q. *Did the holes come true?* A. *The holes did not come true; they cut them out so they would come true.*

Q. Who did? A. The boilermakers.

Q. When? A. When the repairs were made;

Surveyor Clark says (350) that he examined the *Carib Prince* on September 15th after arrival when the chief en-

gineer removed the plug from this rivet hole, "The iron wasn't fair between the two plates" (355) and that he put two fingers in the hole * * that the iron on the inside plate was battered (353), the hole showed smaller on the inside than on the outside * * it didn't appear to be *fair* in the hole between the two plates, it was out about an eighth of an inch (354), it was rounded on the edge of the inner plate (358), when I put my finger in one was a little more on the starboard, the other on the port inside; that he judged by his eye the extent of the difference (356).

On arrival at New York a bolt was put into this rivet hole, and after it had been removed *in January afterwards*, the witness Saunders claimed then to have seen that the holes were only a shade untrue which he estimated was one-sixteenth of an inch (251–261). But he had not seen the rivet hole at the time the vessel arrived on the voyage.

The men who made the repairs were not produced.

Mr. Quinn, an expert, testified to the use of a tapering piece of steel called a drift pin by which such unfair holes are upset so as to get the rivet in at some angle. He also testified that driving a rivet through holes 1/16 or 1/8 of an inch out of line weakened the strength of the rivet one-third. That 6,000 lbs. would be the normal strength of $\frac{3}{4}$-inch rivet, and that

"If a rivet is driven in at an angle it has not the same strength as a rivet driven through a fair hole" (370).

Claimant's witnesses (examined under the English Commission)—who were Short, the builder (169), Wooland, the foreman riveter (185), Sharp, Lloyd's surveyor (219), James, the naval architect (235), and Lynn, his inspector (204) all concur in saying that if the holes do not fair they should be *rimed* out. Short, 180, Wooland, 198, Sharp, 230, James, 246, Lynn, 215.

They also all concur in saying that the *drift-iron* was used on this tank bulkhead. Short, 176, Wooland, 193, Sharp, 226, James, 242, Lynn, 210.

Quinn described (364) the effect of not fairing of the rivet holes: that in *pinning* (*i. e.*, with drift-pins) the gusset plate (knee-tie) to the side of the ship and rivetting the bulkhead by the angle iron to the gusset plate would put a strain on either the bulkhead or ship's side.

The evidence thus clearly showed a case of "clagging"—that is driving rivets through holes punched irregularly in which the rivet never has its full strength, and the uneven and diagonal strains from the opposing surfaces are constantly tending to break the weakened rivet by their divergent and tortional stress.

Such a negligent and dangerous mode of riveting in English yards is a matter of common knowledge, and is described at length in the appendix to this brief (page 25).

The best proof of the loose, angular, and "upset" riveting is the leak. The clinch end broke off in the countersink on the hold side of the bulkhead. This was in the third plate aft from the tank. The water pressure from forward tended to keep in place the rest of the rivet, which was probably more than two-thirds of its original length. Yet this forward part of the rivet was such a loose fit in the holes punched in the knee-tie and in the lap of the plates, that the water was found spurting through in a jet. Such a stream could not run round a well-fitted rivet. At most it would "weep," or let water drip through. This flow of water about the rivet, with its entire cylindrical part unbroken, is conclusive proof of bad fitting.

It was contended that the rivet's weakness was due to hammering it after it was cold, thus making it brittle, and Engineer Keeys testified to this possibility.

Builder Short (179), foreman Wooland (195), Surveyor Sharp (228), Architect James (244), and Surveyor Lynn (212) all say that these three-quarter inch rivets were all headed hot—that it is impossible with that size to head them cold, and that there is no danger of too much hammering.

Wooland (195) says: "In water-tight work it is never done cold * * with a rivet of that size it would be practically *impossible* to knock it down cold" and (201) "I never saw a "heated rivet hammered too much. *The thing* is to get them "to hammer it sufficiently. We have to watch them to see that they hammer it properly."

Quinn says (343) that if driven too cold and it crystallized it would break *in the centre* "and both pieces remain in the "holes,"

In this case the clinch or head came off at the countersink on the hold side of the collision bulkhead.

The damage to the cargo was primarily due to this rivet but the accumulation of four feet of water in the cargo hold shows that the proper water clearances to the bilges were closed.

The limber boards covering the bilges were fitted so tight that no water passed into the bilges.

Capt. Legge says (34) that he had the cargo moved from the sides of the ship so as to get at the limber boards so as to allow the water to get into the bilges and be pumped out, and after moving the cargo (36) we bored holes to let the water go through, and (37) "Q. Until you bored these holes the water "stayed there? A. Yes, sir."

That these limber boards entirely failed to let the water out is also shown by the fact that no water was found by sounding on Sept. 4 (289),(325), (337), (291).

Capt. Legge testified (36, 43,) that the sluices between the bilges and engine room are kept open, but Mate Scott denied this (288). The chief engineer was not asked on this point.

Carpenter Hopkins says (331) that the water in this hold was up to his knee when standing on the dunnage * * (332) he bored five three-quarter-inch holes through the limbers on each side of the ship, all *at the after end* close together.

Mate Scott says (286) he shifted the cargo in the wings and *got the* limber boards up in the after end. "Q. Did you get "them up? A. No: we couldn't get the back one up, *but we* "*cut through* to let the water run down to the strum boxes" (*i. e.*, the strainer in the bilge, 286).

Capt. Legge says (45) that the limbers were not raised at all and 46) when they got to New York they came out "*hard;* "*had to pry them open with a bar.*"

Surveyor Congdon says (407) the limbers are boards covering the water course and should always be made so as to lift out, and he had seen thousands and had never seen them so tight that they would not lift out—that (406) the purpose of the bilges is to make a water course in the ship, to keep the holds

dry and the cargo from being damaged by an accumulation of water.

Capt. Legge says (25) the bilges in No. 1 hold would be 18 inches wide * * (24) that there is a tank runs the entire length of the vessel, divided by the bulkheads, the sides of the tank and the sides of the ship making the bilges, which are triangular spaces * * (41) two feet deep in No. 1 hold aft and 15 to 18 inches forward.

It is obvious this bilge space would contain a large body of water which ought to have run through the sluices and shown in the well when sounded, but that it did neither is certain *and proves the bilges were made useless by the tight limber boards.*

The *Carib Prince* was, therefore, unseaworthy as to this rivet, as both Courts have held, and was also unseaworthy as to lack of water clearance at the bottom of the hold, though the Courts below apparently have passed this over in their examination of the facts.

It appeared that the *Carib Prince* was built in England in the Spring of 1893, under supervision of the architect and surveyor employed by the owner (212, 250); was chartered by the owner to George Christall, of the Trinidad Direct Line (Claimant's Ex. A, p. 148), by which the vessel was covenanted as tight, staunch and strong, and in every way fitted for the service (438), to be maintained in a thoroughly efficient state in hull and machinery (440). Also that bills of lading *with the usual negligence clause* were to be used (450). The libellant's goods were shipped under a bill of lading, making no refer ence to this charter-party, but excepting:

"The act of God, the Queen's enemies, Pirates, Robbers, Restraints of Princes, Rulers and People, Loss or Damage from Heat or Fire on board, in hulk, craft, or on shore, explosion, Steam, *Accidents to or latent* defects in Hull, Tackle, Boilers and Machinery, or their appurtenances, Jettison, Barratry, any act, neglect or default whatsoever of Pilots, Masters, or Crew in the management or navigation of the Ship, Quarantine, Collision, Stranding, and all and every other dangers and Accidents of the Seas, River, or Steam Navigation of whatever nature or kind always excepted" (p. 146).

The learned District Court, Hon. C. L. Benedict, held that

the libellant's damage was due to a latent defect; and following the *Majestic* (60 Fed. Rep., 624) in Circuit Court of Appeals and the *Laertes* (12 Prov. Div., 187) dismissed the libels (pp. 166, 169). On appeal Judge Shipman, delivering the opinion of the Court, held that (1) the defect in the rivet was a latent one that occurred at the time of the ship's construction; (2) the exception of latent defects covered this rivet, although defective before shipment; (3) such exception was valid under the provisions of Section 2 of the Harter Act, and accordingly affirmed the dismissal of the libels. This Court thereupon issued its writ of *certiorari* to review these decisions.

I.—THIS DAMAGE TO LIBELLANT'S CARGO IS NOT WITHIN THE EXCEPTIONS OF THE BILL OF LADING.

The argument is that the libellant's contract, by the words "Accidents to, or latent defects" covered this cause of damage. Would any merchant in his sober senses make the agreement which it is argued has been entered into by libellant? This is what libellant is supposed to have agreed with claimant:—Although your ship is unfit to carry cargo in the fore-hold, and a rivet, defective at time of construction, will let in water from the tank, yet I agree that you, the shipowner, notwithstanding these existing defects, may put my goods under this leak, so that when you fill this tank, you may run a jet of water on them without liability for damages!

(*a.*) The construction of the contract:

For the purpose of engaging in this trade the owner covenanted for the continued fitness and seaworthiness of his vessel, stipulating only with the charterer for a negligence clause in the bills of lading. By the law of England and of this country, the condition or warranty of seaworthiness is always implied.

Lord Esher said in the *Maori King* [1895], 2 Queen Bench, 550, 555:

"If you imply a stipulation in the bill of lading, the result is the same as if it were actually written in it. The moment

you can, by implication, insert a stipulation in a written document, it is, though not expressed, as much a part of the written document as if it had been actually written in it.

"The principle on which a condition or a warranty or any other stipulation is implied will apply to many other contracts, but whether that implication can be made must be determined in each case when it arises. In the present case I have no doubt that, according to the ordinary rules which govern the Court, the stipulation in question is to be implied and therefore to be introduced into the contract. But it applies only to the state of things existing at the commencement of the voyage, and not to anything which may happen after the voyage has begun.

"But there are exceptions in this bill of lading just as in every bill of lading which is in the ordinary form; and, if there are in the contract express stipulations which are in terms inconsistent with the primary implication to which I have referred, that stipulation cannot be implied. In that case there would be express stipulations with regard to the condidition of the machinery or the ship at starting, and when there are express stipulations as to any matter you cannot imply any others. But the exceptions here are, in my opinion, *of the same kind as exceptions in ordinary bills of lading*—that is, with regard to matters which may happen during the voyage. They are exceptions from the obligation of the shipowner to deliver the goods at the end of the voyage in the same condition as they were intrusted to him at its commencement. They do *not apply to the primary warranty of the condition of the machinery at the time when its application is to begin.*"

Every engagement of the shipowner, being based on this primary condition or warranty of seaworthiness of his vessel at the commencement of the voyage, and the exceptions having therefore been judicially construed as relating to events happening on the voyage, do the words "accidents to, or latent defects" in these exceptions abrogate the warranty of seaworthiness of the ship, at the time of loading?

This is decided in the *Caledonia*, 157 U. S., 124, 137. In that case the bill of lading covered "defects," and counsel for the appellant Henderson argued at page 16 of his brief:

"It is very doubtful if any force whatever can be given to the word "defects" in the bill of lading, if it does not cover defects existing at the time of the contract. The word describes an existing condition of the machinery, at the time the contracts were made, and is inapt to describe an injury thereafter to be done to it."

By the judgment of the majority of the Court this contention was rejected. The following clear canon of construction was announced.

"As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability, but not the duty of the owner, and do not, in the absence of an express provision, protect the ship owner against the consequences of furnishing an unseaworthy vessel. *Steel* v. *State Line Steamship Company*, 3 App. Cas., 72; *Gilroy* v. *Price*, App. Cas. (1893), 56; *The Glenfruin*, 10 P. D., 103; *Kopitoff* v. *Wilson*, 1 Q. B. D., 377; *Tattersall* v. *National Steamship Company*, 12 Q. B. D., 297; *Thames & Mersey Ins. Company* v. *Hamilton*, 12 App. Cas., 484. 490. If the exceptions are capable of, they ought to receive, to use the language of Lord Selborne in *Steel* v. *Steamship Company*, "a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken."

"There was no exception in this bill of lading which in express words exempted the shipowner from furnishing a seaworthy vessel at the commencement of the voyage. As the exceptions were introduced by the shipowners themselves in their own favor, they are to be construed most strongly against them, and we perceive no reason why the obligation to furnish a seaworthy vessel should be held to have been contracted away by implication. Their meaning ought not to be extended to give the shipowner a protection, which, if intended, should have been expressed in clear terms.

"Moreover, the words 'delays,' 'steam boilers and machinery, or defects therein,' formed part of a long enumeration of the causes of damage, all the rest of which related to matters subsequent to the beginning of the voyage, and, by another familiar rule of construction, they should be treated as equally limited in ther scope" (pp. 137, 138).

The defect in the *Caledonia* was a latent defect in her shaft, and the words of the bills of lading in that and this case are here set side by side.

CALEDONIA.

"The act of God, the Queen's enemies, pirates, restraint of princes and rulers, perils of the seas, rivers, navigation and land transit, of whatever nature or kind, restrictions at port of discharge, loss or damage from delays, collision, straining, explosion, heat, fire, *steam boilers and machinery or de-*

CARIB PRINCE (fol. 430)

"The act of God, the Queen's enemies, pirates, robbers, restraints of princes, rulers and people, loss or damage from heat or fire, on board, in hulk or craft or on shore, explosion, steam, *accidents to or latent defects in hull*, tackle, boilers and machinery, or their appurtenances, jettison, barratry, any act, neglect

fects therein, negligence, default or error in judgment of pilots, master, mariners, engineers, stevedores or any other person in the employ of the steamship, or of the owners or their agents *excepted.*"

or default whatsoever of pilots, masters or crew in the management or navigation of the ship, quarantine, collision, stranding and all and every other dangers and accidents of the seas, rivers or steam navigation of whatsoever nature or kind always *excepted.*"

Notwithstanding this plain rule of construction the Court below said :

" A defect in order to be latent must have been not discoverable at the time of shipment. It could not in its nature have been capable of discovery then and have become capable of evading discovery subsequently. A construction which should say that latent defects meant only those which had become latent since the vessel left the wharf and could not mean previously existing defects, savors of the distinctions of the schoolmen ; and if latent defects existing upon the voyage are exempted, those existing at the time of shipment are included, for they are the same" (p. 213).

Suppose, for the sake of argument, that it were a case of necessary construction of terms as supposed—that the words " latent defects " would be meaningless, unless applied to the beginning of the voyage. Does it follow that such redundant and ill chosen verbiage inserted among the carrier's own exemptions—words selected by the carrier himself—are therefore to be permitted to destroy the primary warranty of seaworthiness ?

The courts rather regard such incoherent and illogical documents as " a considerable puzzle," Taylor *v.* Liverpool, etc., Co., L. R. 9, Q. B. 146, as involving no principle of law but only careless and slovenly documents.

Gray *v.* Carr, 6 Q. B., 549.

But this necessity of construction does not exist.

The carrier by sea who has provided a fit and seaworthy ship, notwithstanding subsequent sea perils, has duties toward her cargo. If his mast is sprung or a collision occurs with a derelict, or if a deck plank be cracked, the master is bound to know and discover such accidents and resulting defects as soon as they exist. Failing to do this the ship is liable.

The *Nith*, 36 F. R., 86.

Suppose that during a storm the mast is internally weakened and that thereafter and on a later stage of the voyage it is carried away doing great damage, is the latent defect any the less because it was originally developed and resulted in damage to cargo on one and the same voyage? If it be answered that for such a defect the master would not be liable and would need no exemption, the answer is that the *Carib Prince* as a common carrier would otherwise be *prima facie* liable, and that this exception, like that against governmental restraints, effectually shifts the burden of proof.

The *Majestic*, March 29th, 1897.

Suppose that an Eastbound China steamer were to leave New York with cargo for Yokohama *via* Gibraltar, Suez and Hong-Kong. Heavy weather being encountered on the Atlantic the shaft is strained and weakened like that of the *Caledonia*, and although the vessel puts into Gibraltar, Suez and Hong-Kong the damage from the latent defect was not remedied, until finally the shaft breaks between China and Japan. Would not that exception of *latent defects* apply, and would any court decline to give it force because the defect did *not* exist at time of shipment?

It certainly is novel to contend that the general exception of "defects" leaves the carrier liable on his warranty, but that a less exemption of one kind of defects, namely, those which are latent, releases the shipowner from this same warranty.

As was also decided in the *Caledonia*, the connection in which the terms appear limits their scope. Not only are "latent defects" found among an enumeration of causes of damage happening on the voyage, but they are in a special subdivision of this enumeration and are joined to acts of the servants, engineers and navigators of the vessel. First are found those causes of major force—of interference from with out—included under the act of God, the Queen's enemies, pirates, robbers, restraints of princes, rulers and people. Second, those losses due to the agency of the ship's servants, whether accidental or culpable; loss or damage from heat or fire on board, in hulk, or craft, or inshore explosion, steam, *accidents to or latent defects in hull*, tackle, boilers and machinery, or their appurtenances, jettison, barratry, any act,

neglect, default whatsoever of pilots, masters or crew in the management or navigation of the ship, quarantine, collision, stranding and all and every other dangers and accidents of the seas, rivers, or steam navigation. The word "quarantine" is evidently a later insertion and is perhaps out of its true logical order, but the list will be examined in vain to find in either class one other expression that in any way relates to the *owner's* duty to have a fit ship at the beginning of the voyage.

The language of Chief Justice Fuller may be re-enforced by that of Lord Penzance in The Quebec Ins. Co. *v.* Bank, L. R., 3 P. C., 242, where he said :

" It is said that the language of the policy is such, that the Court ought not to imply therefrom the ordinary warranty of seaworthiness. No doubt it is competent to parties by language in a contract to which, as an ordinary rule, the law applies some implied condition, *by express, pertinent and apposite language*, to exclude that condition, and the question in this case is, whether the parties have done so? This, like all questions of contracts, is a question of the intention of the parties. The law by which the warranty of seaworthiness is attached to the contract is a law known to the parties who make contracts of this description, and, therefore, they are prepared to understand that the implied warranty will be attached to the contract they are about to make. *If, therefore, there is an intention to exclude that implied warranty it ought to be expressed in plain language.*"

In the cargo *ex* the *Laertes*, relied on in the courts below, the clause added to latent defects the words, "*even existing at the time of shipment*" obviously a very different contract.

Suppose that instead of the libellant's goods being damaged, the ship had, in the same way wet the goods of the charterer. No question would arise that the charter party had expressly made the ship and owner liable. But that express covenant of seaworthiness contained in the charter party was no more than is *implied* in every shipment upon a general ship, alike by English and American law. It is as positively a duty of the owner of the *Carib Prince* towards libellant as to the charterer from the general liability of the vessel as a common carrier.

(*b.*) This bad riveting was not alatent defect.

The defect in the rivet hole was known at the time the holes were punched ; it was known when the lap was in pos-

ition and the holes did not meet "fair and true;" it was known when the drift pin was resorted to to straighten the irregularity; it was known to the men who drove the rivet; and it should have been known to the claimant's architects and surveyors whose duty required them to interfere and condemn such improper construction.

It is entirely different from a flaw in a welding which is a secret vice not ascertainable, and generally not due to any fault either before, during, or after construction.

Suppose caulkers on a wooden ship do not rightly drive in the oakum, but leave the seams improperly caulked. Suppose that the surveyor neglects to find this bad seam and the copper sheathing is nailed on, and, thereafter, on the first strain with cargo aboard this seam admits water. Is this defect latent because it escaped the eye of the surveyor?

By the fair rules of interpretation the word *latent* as applied to excepted defects in a vessel or machinery, should not mean those things that a builder or the owner's surveyors may conceal so that thereafter the vice may be hidden from view, but should only embrace those undiscoverable imperfections that cannot be found by any care or skill.

12 Am. & Eng. Encyclopædia of Law, p. 910.
Article "Latent Defects."

In case where a railroad purchased its car axles ready built from a manufacturer, the New York Court of Appeals held:

"That although the defect was latent and could not be discovered by the most vigilant external examination, yet, if it could be ascertained by a known test applied *either by the manufacturer* or the defendant, the latter was responsible."

Hegemann *v.* Western Railroad Co., 13 N. Y., 9, 25.

This decision has been cited with approval by this Court in an admiralty suit.

The *City of Panama*, 101 U. S., 459, 462.

In case of the *Rover*, 33 F. R., 516, it is said:

"This warranty extends to latent defects, not discoverable by prior examination."

In case of the *Laertes* Mr. Justice Butt said:

"The *Laertes* broke down from a latent defect which, I find as a fact, could not have been discovered by the exercise of any reasonable care on the part of the owners, but the flaw in the shafting which led to the breakdown existed when the ship started, and, therefore, she was not seaworthy for the voyage."

"Defects must exist which no skill can detect and the effects of which no foresight can avert."

Readhead *v.* Midland R. R. L. R. 4, Q. B., 379, 385.

"If they had arisen from a latent defect *which no prudence or skill could perceive.*"

Steel *v.* State Line Co., 3 Appeal Cas., 72.

In Work *v.* Leathers, 97 U. S., 379, 380, this Court held:

"If a defect without any apparent cause be developed it is to be presumed it existed when the service began."

Applying the same presumption of fact, if admitting water into this ballast tank developed this defect the first time it was tried after the vessel had been at sea, it is to be presumed that a similar test by water before taking on this cargo would have disclosed this defect, which therefore would readily have been discovered. Instead, therefore, of being a latent defect it was due to insufficient preparation and examination before entering on the voyage.

The *Edwin I. Morrison*, 153 U. S., 199.
The *Majestic*, Mch. 29, 1897.

It is true that claimant showed that the engineer looked at this bulkhead and also entered the tank, but the simple test *letting in water* was *not* then tried, although the vessel had just been through a West India hurricane.

As this Court has said:

"In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the caps and plate, if loss occurred through their displacement."

The *Edwin I. Morrison*, 153 U. S., 199, 215.
See Penn. Co. *v.* Roy, 102 U. S., 455.
Robinson *v.* Central R. R. Co., 8 F. R., 877.

In case of cargo damaged by water, supposed to have come through a defective rivet hole in the tank, Judge Brown said:

"I do not find any legal principle upon which the risk of such defective riveting should be thrown upon the goods, and not upon the ship.

The *Bergenseren*, 36 F. R., 700, 701.

Every presumption of law is against relaxing the duty of the shipowner to supply a seaworthy ship which is the basis not only of all his exceptions from liability but for the cargo's marine insurance.

Thus Maclachlan, in his excellent treatise on shipping says, 418:

"As the strictness looked for in fulfilling a waranty is required here, his care should carry him *as far as the carrier's contract requires him to go, and further than that*, even to the letter of the law in its exactions under the insurer's contract."

The Quebec M. I. Co. *v.* The Com. Bk, L. R., 3 P. C., 243 Lord Penzance said:

"It would seem, therefore, an odd conclusion to come to, to say that * * the underwriters * * should have intended to surrender the warranty of seaworthiness, *which, after all, is the main protection to their interests.*"

2 Arnould M. Ins., 649 (6 ed.): "There is nothing in the law of marine insurance more important to commerce and the preservation of human life than this warranty" (of seaworthiness).

It follows that if the carrier may by contract relieve himself from the warranty of seaworthiness and instead of a seaworthy vessel, may substitute one that he believes to be seaworthy, or has used diligence to make seaworthy, but which in fact is not seaworthy, the shipper can obtain no insurance for his goods, and the anomaly in the law would exist that it requires the insured to provide a seaworthy vessel, and allows the carrier to furnish one that is not so.

This is pointed out in the opinion of Chief Justice Fuller in the *Caledonia*, where he quotes from the decision in the *Eugene Vesta*, 28 F. R., 762, by Mr. Justice Brown as follows:

"*The theory of the law is that the implied warranty of seaworthiness, shall protect the owner of the cargo until his policy of insurance commences to run.*"

And the Chief Justice also quoted the words of Field *J.*, in Cohn *v.* Davidson, 2 Q. B. D., 455, who said:

"No degree of seaworthiness for the voyage, at any time anterior to the commencement of the risk, will be of any avail to the assured unless the seaworthiness existed at the time of sailing from the port of loading. *As therefore the merchant*, in a case like the present, *would not be entitled to recover against his underwriter by reason of the breach of the warranty in sailing in an unseaworthy ship*, it would follow that, if the warranty to be implied on the part of the shipowner is to be exhausted, by his having the ship seaworthy at an anterior period *the merchant would lose that complete indemnity, by means of the two contracts taken together, which it is the universal habit and practice of mercantile men, to endeavor to procure.*"

The reason of the implied warranty is "that it takes away all temptation to expose life and property to the dangers of the seas in vessels not fit to encounter them" (per Curtis *J.*, in Bullard *v.* Roger W. Ins. Co., 1 Curt., 155) and that "every relaxation of the common law in relation to the duties and responsibilities of the owners of carrier ships *is founded in bad policy* and detrimental to the general interest of commerce" (per Story *J.*, in the Sch. *Reeside*, 2 Sum., 575).

In the *Edwin I. Morrison* this court said it was unwilling "to relax the *important and salutary rule in respect to seaworthiness*," quoting the *Reeside supra* and Douglas *v.* Scougall, 4 Dow, H. L., 269.

II.—Such an exemption as is claimed, is contrary to the terms of the Harter Act, Chapter 105 of the Laws of 1893:

Discussing the *third* section of the Harter Act, the Honorable Addison Brown, said:

"There is no question here of latent defects in the structure of the ship, but only of due diligence in inspection, maintenance, and repair, and the Harter Act does not establish any new rule of diligence as to either of those subjects. The obligations of due diligence to make the ship seaworthy are in

all respects the same as before the Act." The *Alvena*, 74 F. R., 252, 254.

In return for the exemptions in the third section, the second section contained a prohibition of any clauses avoiding or weakening the shipowner's obligations as to seaworthiness. In the report of the Committee on Interstate and Foreign Commerce was embodied a petition of the Glasgow Corn Trade Association to the Marquis of Salisbury (already considered and quoted in an opinion of this Court) which set forth among the intolerable evils of bills of lading then existing, that they provide for—

" defect or insufficiency of the hull, machinery or fittings of a vessel, whether occurring before or after receiving the goods on board."

The *Delaware*, 161 U. S., 459, 472.

Accordingly, before giving the vessel owner any immunity or benefits, the Harter Act begins by prohibiting these various attempts by the shipowner to contract himself out of his own duties, as distinguished from his liabilities for the acts of his servants.

THE HARTER ACT.

" AN ACT relating to navigation of vessels, bills of lading and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or

shipping document any covenant or agreement whereby the *obligations* of the owner or owners of said vessel *to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage*, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo, and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

It will be observed that Congress recognized the *obligations* (the plural is important) of the owner as of two kinds.

1. The obligation of the owner to exercise due diligence to properly equip, man, provision and outfit said vessel.

2. The obligation to make said vessel seaworthy.

This distinction has been recognized by this Court.

The warranty of seaworthiness is *absolute*, and the Court also says that the duty to carefully stow cargo is limited to *due* diligence.

In Lawrence *v.* Minturn, 17 How., 115, Curtis, *J.*, said:

"The master is bound to use *due diligence and skill in stowing and staying the cargo*, but there is no absolute warranty that what is done shall prove sufficient."

It is also true that the obligation to have a competent master and crew is not one of warranty, but of due diligence in selection. Neither does the owner warrant that the ship will have coal or provisions sufficient for the voyage, but only that due care has been taken to equip and supply the vessel.

The grammatical construction bears out the above contention. The conjunction "*and*" is used twice in the sentence:

"Whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision *and* outfit said vessel, *and* to make said vessel seaworthy."

The verbs "*to exercise*" and "*to make*," coupled by the second "and" go back to "obligations," while the first "and" connecting the words "provision" and "outfit" join those words to the "*due diligence.*" The use of the word "properly" also confirms this; it qualifies the "*due diligence*" and explains that it applies to each of the items, *equip, man, provision, outfit;* but it has no application

to the "*make said vessel seaworthy*," which is left, as before, an absolute obligation.

Full force must be given to the words, "*in anywise be lessened, weakened or avoided.*"

It is plain that Congress was dealing with a well-defined *obligation*, and one whose degree of binding force it declared should not be "lessened, weakened or avoided" and this could only be done by keeping it exactly as it then existed.

This separation is made more clear by reference to the original bill prepared by special committee of the New York Chamber of Commerce on March 6, 1884, which passed the House of Representatives on February 3d, 1885. Section 3d of this first bill is the prototype of the second Section of the Harter Act.

The original section was as follows:

"SECTION 3.—That it shall not be lawful for any such vessel, her owners, master, agent or manager, to insert in any bill of lading any clause, covenant or agreement whereby the obligations of the owners of said vessel to properly equip, man, provision and outfit such vessel, *and in every way and manner within their, his or her power to render said vessel seaworthy and capable of performing her intended voyage*, shall in any wise be lessened, weakened or avoided; and all provisions and clauses contained in any bill of lading issued by any such public carrier relieving from liability the vessel, her owner or master for them, or his neglect, or for any improper condition of the vessel shall be null and void and of no effect in law."

Wendt's Papers on Maritime Legislation, p. 403, 3d Edition, London, 1888.

Obviously there were here two distinct obligations of the vessel owner; and the one relating to seaworthiness was then made a relative matter of the owner's opportunity and diligence. In the Harter measure, as it originally passed the House all qualifications of this latter obligation were struck out so as to read "and *make* said vessel seaworthy, etc.," restoring the owner's full warranty. The Senate wisely inserted the qualification of "to use due diligence" as to the *first* obligation to properly *equip, man, provision and outfit*, but carefully left the duty of *seaworthiness* unqualified as by the existing law.

No doubt these stipulations in contracts about "insufficiency

and defects of vessels" which greatly increased between 1885 and 1893, moved Congress to these significant changes.

The complaint of the Glasgow Corn Trade especially called attention to this abuse of the owner's power of framing one-sided bills of lading.

Congress then had before it a distinct grievance of business men that the obligation of seaworthiness was being avoided by these contracts against "defect or insufficiency of hull, machinery or fittings, even at time of loading."

Congress declared at the outset that this obligation of seaworthiness should not be in any wise lessened, weakened or avoided.

It was plainly intended, therefore, to stop these stipulations against defects in the vessel, since that was the only way that this obligation of the shipowner had been defeated.

Thus the English Court of Appeal in interpreting the Harter Act as embodied in a bill of lading given at Baltimore, held:

"That it was the duty of the owner *to ensure* that the ship was in a perfectly seaworthy condition before she left port, and that it was not enough to appoint a competent agent."

Dobell *v.* the Rossmore Steamship Co. (1895), 2 Queen's Bench, 408.

The obligation of the shipowner to make his vessel seaworthy had been abundantly settled in the United States by decisions before this act of Congress.

The *Northern Belle*, 9 Wall, 526.
Work *v.* Leathers, 97 U. S., 379.
The *Caledonia* (at circuit), 43 F. R., 681, 685.
Liverpool Steam Co. *v.* Phenix Co., 129 U. S., 397, 438.

In case of damage by leaks in a deck which had been repaired before starting on the voyage, Judge Brown said:

"The leak having occurred through the deck, the burden of proof is upon the libellants (here the shipowners) to show that the deck when the brig sailed was fit to withstand all the ordinary hazards of the voyage at that season, and that it was free from all latent, as well as visible defects."

Hubert *v.* Recknagel, 13 F. R., 912.

III.—By the general maritime law the shipowner is liable for libellant's damage.

It is confidently submitted that among all modern seafaring countries the shipowner is not relieved for defective riveting, merely because his surveyor did not discover it when the vessel was constructed.

Art. 560 of the German Commercial Code is:

"In every kind of contract of affreightment, the owner has to deliver the ship in a seaworthy condition. The owner is liable for every damage that arises from defective condition of the vessel unless the defect could not be discovered in spite of all possible care (dass die Mängel aller Sorgfalt ungeachtet nicht zü entdecken waren).

Commenting upon this article, Dr. Lewis, in his treastise, says:

"Wenn das Gesetzbuch den Befrachter von der Verhaftung nur dadurch befreien lässt dass die Mängel aller Sorgfalt ungeachtet nicht zu entdecken waren, so fordert es von demselben mehr, als dass er die gehörige Sorgfalt (diligentia diligentis patris familias) zur Leistung eines seetüchtigen Schiffes anwende. Derselbe hat die Seetüchtigkeit selbst unbedingt zu gewähren. Er wird nicht dadurch befreit dass er das Schiff durch Zimmerleute nachsehen, dichten, kalfatern, repariren lässt, sondern er hat auch für die Versehen dieser Leute einzustehen und haftet nicht nur für *culpa in eligendo*. 'Nur wenn es unter gewöhnlichen Umständen ausserhalb der Möglichkeit gelegen 'hat', den Mangel zu entdecken,' wird derselbe von der oben gedachten Verplichtung befreit." Prot. VIII., s. 3848.

"While the Code allows the owner to release himself from the liability only when the defects were not discovered in spite of every precaution, yet it demands more of him than that he exercise due care (the diligence of the father of a family) in furnishing a seaworthy ship. He has unconditionally to warrant the seaworthiness itself. He will not be relieved, because he has had the vessel inspected, caulked, repaired and tightened by carpenters. On the contrary, he is responsible for the neglects of these people and is liable not merely for wrong selection of them. 'Only when in ordinary circumstances it is beyond the bounds of possibility to discover the fault,' will he be relieved from the above obligation."

Lewis Das Deutsche Seerecht, Vol. I. (2d Ed.), p. 247.

Also Article 297 of the French Code of Commerce:

"The master loses his freight and is liable for the damages of the affreighter, if the latter proves that when the ship sets sail it was not in a navigable condition. This proof is admissible, notwithstanding the certificates of inspection at departure."

This is almost the identical terms of the Ordonnance de la Marine of 1681, book III., title 3, art. 12.

Notwithstanding the employ of the best surveyors and the complete ignorance of the shipowner, he may thus become liable for all resulting damages from sending an unfit ship to sea.

Prof. Lyon-Caen, of the law faculty of Paris, has recently written :

" It is very severe to condemn the owner (fréteur) in damages, when he was ignorant of the bad state of his vessel, and had it inspected ; it makes him liable for a defect which escaped even the attention of the expert surveyors (quand il a ignoré le mauvais état de son navire et a fait operer la visite ; on le rend responsable d'un vice qui a échappé à l'attention des experts, visiteurs eux-mêmes.")

Traité de Droit Maritime. Vol. 1, p. 449, Paris, 1894.

Valin, in his commentary upon the older provision of the Ordonnance said :

" This penalty, however, should not appear too rigorous, since by the nature of the contract of affreightment, the master is necessarily held to warrant his ship to be good and perfectly in condition to make the voyage in question under penalty of all costs, expenses and damages."

This author adds that surveys and inspections do not change this liability, because such examinations do not discover

les vices interieurs et cashés, dont par conséquent le propriétaire ou le maître demeure toujours responsable, et cela avec d'autant plus de justice qu'il ne peut pas ignorer le mauvais état du navire : mais quand il l'ignoreroit, il en seroit de même, étant nécessairement tenu de fournir bon et capable de faire voyage."

Nouveau Commentaire, vol. 1, pp. 653, 654, (Rochelle, 1766).

Discussing these articles, Desjardins asks :

"May the owner (fréteur) stipulate that he shall not be responsible for unseaworthiness even before the departure ? It may certainly be maintained that the obligation to deliver a ship in a serviceable condition is not merely of the nature, but the essence of the contract of affreightment. Is it immoral and odious to engage to send a rotten ship to sea, and at the same time a crew to their death ? Is not the stipulation, which in such case would discharge the owner's responsibility, contrary to public order ? The question is grave."

He finally and reluctantly concludes that such a stipulation prepared in special terms might stand, but it should never be inferred and must be clearly expressed.

Traité de droit Maritime, vol. 3, p. 518, Paris, 1882.

The power of the shipowner to contract away his obligation to have a seaworthy vessel was under careful discussion at the International Congress of Antwerp in 1885. The solution of this question, contained in Article II, was:

"Il doit être interdit aux propriétaires de navires de s'exonerer d'avance de leur responsabilité par une clause inserérée dans le contrat d'affrétement, le connaissement, ou toute autre convention:

A. Pour tous les faits de leurs capitaines ou de leurs preposés qui tendraient à compromettre le parfait état de navigabilité des navires.

B. Pour tous ceux qui aurient pour effet de causer des damages par vice d'arrimage, defaut de soins, ou incomplete deliverance des marchandises confiées à leur garde.

It should be prohibited to shipowners to exonerate themselves from their liability in advance, by a clause inserted in a contract of affreightment, bill of lading or any other agreement:

A. For any act of their masters or their officers tending to compromise the perfect condition of seaworthiness of the ships.

B. For any act which would cause damage through improper stowage, want of care, or incomplete delivery of the goods entrusted to their care.

5 Valroger, Droit Maritime, p. 397.

In May, 1886, the Chambers of Commerce of Bremen and Hamburg prepared a proposed form of bill of lading with rules for liability, in which the first provision was:

"Rule I.—The shipowner is responsible for the proper fitting out of the vessel and for its being equipped, manned, and provisioned, and *in a seaworthy condition*, capable to undertake the intended voyage, also for errors or negligence of his employees respecting proper stowage, care, treatment, and delivery of the cargo. All agreements and clauses to the contrary to be null and void and of no legally binding force."

Wendt's Papers on Maritime Legislation, p. 490 (3d Ed., London, 1888.)

IV.—SUCH BEING THE LAW OF THE PRINCIPAL MARITIME STATES, IT IS TO BE PRESUMED THAT CONGRESS DID NOT INTEND BY THE ACT OF 1893, TO PUT OUR OWN LAW OUT OF HARMONY WITH THE LAW OF THE SEA.

The wide and generous immunity for the acts of the ship-owner's servants given by the third section is predicated by the second section, upon a firm adherence to the salutary obligation of the owner to have a seaworthy ship.

The decree of the courts below should be reversed, and the cause remanded to the District Court of the United States for the Eastern District of New York, with direction to enter a decree for libellant with costs.

HARRINGTON PUTNAM,
Advocate.

Dated April 14th, 1897.

APPENDIX.

DESCRIPTION OF "CLAGGING" OF SHIP'S PLATES, IN BUILDING BY W. CLARK RUSSELL.

Having mentioned a deposition of a shipmaster, who suddenly found four feet of water in his forehold, the author continues:

"This deposition worked very strongly in my head the other day when I happened to find myself standing under the bends of the towering iron skeleton of a ship that, when completed, would be 100 A 1, and qualified to carry three thousand tons of merchandise. The hammering all about me was sharp and furious, the sparks flew wildly, and as the white-hot rivets popped out of the holes they were cut and hammered by the men as though they were carrots. There were other ships on a line with this, one completely plated and painted, another half finished, a third a mere outline of frames, and keelson and stern pieces. The scene was an imposing one, and especially imposing was the appearance of the completed ship with the polish of her clean metal run and the gilt tracings about her figurehead and quarters. And yet when I turned my eyes from her to the skeleton under which I was standing I somehow felt a good deal of my admiration leaking away from me. I called to a man who was hammering close beside me. "Do you know what clagging is, my friend?"

"Ay," said he, looking at me with a broad grin, "Ye dorn't need to go very far to find out the meanin' o' that word."

"These things," said I, striking a long curve of metal, which in a wooden ship would be spoken of as ribs, are called frames, aren't they?"

"Ay, those are the frames," he answered.

"I suppose they have a good deal of weight to bear, a good deal of pressure to resist?" said I.

"Rather," he replied; "why, they're pretty nigh the ship, man."

"Then, what do you make of that flaw there, and that crack there, and there, and there?" said I, pointing to the places as I spoke.

"Pooh!" said he, "when the plates are on that's all covered up."

"Yes," said I, "so I suppose; but do you know I don't see a frame that hasn't three or four—and there's one with six—of those cracks and flaws plain to be viewed upon it. Considering the dimensions of this vessel, do you think it wise—

I'm speaking in the interest of human lives, my man—to put in such defective iron as this?"

He made no answer, aud was about to resume his work.

"Here," said I, "there is no thirstier work than hammering," and I gave him a shilling. "How do you get the iron plates which cover these ribs to fit?"

"They're rolled," he replied, pocketing the shilling with a look around.

"The part of the plate that overhangs another," said I, "is, I think, called the landing."

"Ay," said he, "the lannin', that's right."

"Do you see this landing here?" I asked. "I'm not sure that I couldn't put my little finger between it."

"Oh, the rivets 'll draw that into its place," said the man.

"True," I exclaimed; "but you wouldn't call it a fit?"

"No," he answered; "I wouldn't call it a fit, but the rivets 'll make it one."

"But don't you see," said I, "that by prizing these plates together with the rivets you are putting work on the rivets which they ought not to bear? If the blow of a sea springs the rivets the plates must yawn open. At this rate it seems to me that the rivets not only keep the plates together, but actually gives the hull its shape."

"What are ye, sir?" said he to me; "a surveyor?"

"No, my man," I replied; "if I were I should be talking to your master, not to you. Here's another point that strikes me as worth noticing; Look at these rivet-holes. They're all punched, I observe."

"Certainly they're punched," he answered.

"But don't you think they ought to be drilled?" I asked, punching is bound to weaken the rivet-holes by cracking and dislocating the fibres of the metal around them, and rendering them all the less fit as a hold for the rivets."

"Drilliug 'ud be much better, of course," said the man, but it ud be pretty nigh double the expense, and that ud be going the wrong way to what the shipowners want."

"But here again I see another curious feature," said I. Look through these rivet-holes, one after another, as many as you choose. There's actually not a single hole in the front plates that corresponds with the holes in the plates at the back. How on earth are you going to drive a rivet through such a hole as that for instance?" Said I, pointing to a hole that was so much lower than the hole behind it that the apertures where the two plates met resembled a half moon.

"Oh, we'll rivet 'em somehow," he answered laughingly, and without even glancing at the holes to which I sought to direct his attention.

At this juncture somebody who might have been the manager came sniffing curiously about me; the man went on with his

work, and I moved off. Before quitting the yard, however, I walked over to the other vessels—the incomplete ones, I mean—and had a look at them. Here I found precisely the same kind of workmanship and material—the frames full of cracks and flaws, the rivet-holes roughly punched, and not a single hole corresponding with the holes behind; the "landings" yawning and waiting for the rivets to be prized and warped and severely strained into their places. I am not writing learnedly; I am avoiding all technicalities, as I wish the land-going public who know nothing about marine terms to understand me. Neither do I assert that this shipbuilding yard which I inspected is a typical one. But this much I will say, and as a man who has some small knowledge of the power and fury of the sea in a time of tempest—that were I a forecastle-hand and had to choose between one of these brand-new, A 1 iron steamships of from two thousand to three thousand tons gross and one of the old coasters which have long since been condemned and rendered impossible, I should be perfectly content to abide by the toss of a coin for either, satisfied that, so far as security at sea goes, there would be just as much promise of my speedy dissolution aboard such a brand-new steamer as aboard the sievelike old coffin. It is not hard to understand what a reproach this kind of vessel is to us as a maritime nation and how it has come about. The same fierce competition that covers our tables with butter made of fat, and coffee made out of old beans, is covering the ocean with the sort of ships I am writing of. The problem is now how to build the cheapest steamer to carry a maximum cargo on a minimum draft of water, and to pass the surveyors as fit to go to sea and do heavy work there. The shipbuilders are not to blame. They will do good work for good money; but if good money is not forthcoming, though some kind of work be expected, then they will give you frames which are only fit to sell for old iron; the workmanship will be mere "clagging" the plates will be wrenched and warped into any kind of abominable fit by the rivets; the whole structure and the lives of the people who commit themselves to be will be made to depend upon points which no honest shipwright would dream of reckoning as factors in the binding and holding powers of the fabric; and the false and frail contrivance, doctored up and smothered over with paint, will be launched with all haste, that the account may be settled, and the next order proceeded with at once." * *

"And now let me say here a few words on the subject of marine surveying.

"If there be one class of responsible men more than another who should be wholly above suspicion, who should be pos-

sessed of a moral courage equal, under all circumstances, to the unbending and unfaltering discharge of the duties accepted by them, they should consist, one would think, of the men employed by Lloyd's and the Board of Trade to inspect the construction of ships, and to pronounce upon their fitness as seagoing fabrics. You have only to consider what is involved in the duties of marine surveyors to appreciate the high and extraordinary character of their obligations. Upon their capacity to distinguish between good and bad work, and upon their courage as judges to whom their employers intrust the exercise of the widest possible discretion, practically depends the life of every human being who goes to sea as a sailor or as a passenger. Of course, the difficulties of the vocation, humanly speaking, are not hard to understand. We may appreciate the embarrassment a surveyor labors under in having to condemn the work of a shipbuilder with whom he is on very friendly terms, to say no more. The temptation to inspect any other part of the fabric than that which imperatively calls for condemnation must, under certain circumstances, be very great. But let all this be freely admitted. Life is more precious than class sensibilities, and if an evil is to flourish only on the condition that nothing is said about it, most of us will agree that it is high time to cultivate candor, in that direction at least.

"I have no hesitation in saying that a large proportion of the marine surveying of the day is one of the most glaring, as it certainly is the cruelest of the shams of the period. Samples of work are passed which, were there the least sincerity and conscience in the minds of those who decide upon them, could under no possibility have left the yards in which they were produced. Men, women, and children are sent to sea in structures which never would have been permitted to quit the only places they are safe on—I mean the dry land—had the surveyors put any shadow of honesty into the duties they are appointed to discharge." * *

"There is not a shipmaster in the country who is not sensible of the necessity of a speedy reform in this matter; and there is not a passenger who would not eagerly join in the cry for reformation were even but a very little bit of the truth published in language which should be intelligible to the landsman." Plates and Rivets by W. Clark Russell, 1887.

INDEX

	PAGE.
Defective limbers	1
The charter-party	2
Are the defects trifling?	4
Duty to try tank	7
Law of ballast tanks	8
Day when leak was discovered	9
Distinct causes of damage	10
Construction of exceptions in a bill of lading	10
Shipowners' personal duties as distinguished from their liability for acts of their servants	12
What are latent defects?	14
These principles applied to the *Carib Prince*	17

Appendix.

French Authorities.

Lyon-Caen, Traité de Droit Maritime	20–21
Boutard, Des clauses de non-responsabilité	20–21
Owner of steamer *Cid* held liable for damage to cargo from defect in equipment (Ct. of Cassation)	22–23
Owner of steamer liable personally for defective engine	24–25
Owner of steamer *Versailles* liable for not closing valve of discharge pipe, and not having bulkheads and doors water tight (Paris Ct. of Appeal)	26
Same case in Ct. of Cassation holding that the bill of lading did not apply to such fault of the owner	36–39
Owner held liable for insufficient equipment, notwithstanding negligence clause (Tribunal Hâvre)	40–43

Belgian Decisions of Court of Cassation.

Owners of *Knight Templar* held liable for defective water tank and obstructed limbers. Owners could not exonerate themselves therefor	44–49
Owner of *Rothwell Castle* held liable for leak from tunnel into hold, and stopping pumps, notwithstanding negligence clause in bill of lading	50
Owner of steamer *Harter* held liable for not prohibiting captain from loading in a defective hold	56–59

GERMAN AUTHORITIES.

Shipowner not allowed to shift on others the duty to make his vessel seaworthy. Deliberation of the Commissioners of German Commercial Code.... 60, 61

Latent defects are those impossible to be discovered. Citation from the *Seerecht* of Lewis, Reatz and Schroeder..... 60, 61

Latent defects—Vessel having been surveyed and classed not proof of diligence—Obligation of seaworthiness. Decision of Imperial Court (Penny *v.* Ehlers) Mch. 17, 1894..... 62, 67

Liability of shipowner for filling ballast tank with manhole open. Hanseatic Court of Appeal and Imperial Court (The *Castleventry*)..... 68, 85

Liability for leak from defective feed pipe. Duty to guard water pipes, and search for defects. Hanseatic Court of Appeal (The *Bellona*), Jan'y 30, '92..... 86, 95

SUPREME COURT OF THE UNITED STATES

JOSEPHINE W. WUPPERMANN
AGAINST
The steamship CARIB PRINCE } No. 45

SUPPLEMENTAL BRIEF FOR THE APPELLANT UPON RE-ARGUMENT.

The examination of the record in the courts below discloses a clear case of damage to cargo unattended with storm, stress of weather, or other *vis major*. Libellant's cargo has been damaged by water ballast carried in a tank, high above the level of the cargo. The causes of this damage were plainly the unfitness of the bulkhead or after side of the tank through a defective rivet, and the failure of the water clearances to act properly in the cargo compartment, so as to let the water escape through the limbers in the bilges.

It is not denied that the loss is wholly due to this unfitness of the vessel—a faulty and unseaworthy condition existing at the beginning of the voyage.

THE DEFECTIVE LIMBERS.

Both courts have held the *Carib Prince* to have been unseaworthy as to the rivet in the bulkhead—a defect which was the initial cause of the loss. But the courts below have apparently failed to appreciate another and more direct cause of the extensive damage that ensued. If the water clearances of such a hold are in order, the damage is confined to the place of the leak, and along its flow to its escape through the limbers at the sides into the bilges, and through the sluices to the pumps. But here the limber boards were quite useless, and shut off the water from its proper

exit, and so held it back in an increasing volume until it had risen four feet, and had saturated cargo to that level throughout this compartment. This is undisputed. The extent and height of the damage confirm the frank acknowledgment of the master of this fault in his limber boards. It is admitted that the point was duly urged below (appellant's brief, 1897, p. 6).

Such defects are vital, and render the vessel liable even where the original leak is from sea perils.

The *Centennial*, 7 F. R., 601.
The *Samuel E. Spring*, 29 F. R., 397.
The *Charles J. Willard*, 38 F. R., 759.
Rondeau *v.* Bergwitz, Appendix, p. .

Yet the opinions of the courts below have ignored this defect, so striking, obvious and indefensible, that it would tax the skill of counsel to argue that it could be deemed *latent.*

The obligation of the shipowner to respond for this cargo damage on a vessel engaged as a common carrier, would ordinarily seem clear. The contention, sustained below, is that by valid subsisting agreements between the shipowner and libellant this right to damages has been contracted away.

THE EFFECT OF THE CHARTER-PARTY.

The libel is *in rem* and in art. 2 (*Record* p. 2) alleges the shipment on the *Carib Prince* "as a common carrier," at a time and place mentioned :

"And the agents of said steamship signed bills of lading therefor dated the 31st of August, 1893, whereby they acknowledged the receipt of said 500 cases in good order, and well conditioned and undertook to deliver the same at the port of New York, in like good order."

Mr. James Knott, the owner and claimant of the ship, met this allegation by his denial :

SECOND.—He has no knowledge of the matters alleged in the second article of the libel and requires proof thereof, if, and in so far, as they are material." (*Record*, p. 4.)

In a further part of the answer he set up the exceptions of

this bill of lading and alleged "that the owner and *charterer* of said vessel used all due diligence to have her properly equipped, manned, provisioned and outfitted, and in every way seaworthy" and pleaded latent defects, also fault or error in management or navigation of the vessel. (*Record*, p. 5).

The charter party was thus brought into the case by this averment of the owners and *charterer's* diligence, in the answer itself.

While the averment of the answer was carefully drawn to cover the condition of section 3d of the Harter Act, it is to be noted that Congress there requires the due diligence to be exercised by the *owner*. This duty cannot be delegated to a charterer, though if such care have been first taken by the owner, then the *charterer* and the vessel itself, may be relieved from certain specified liabilities.

The owner, invoking the diligence of a *charterer* to supplement his own diligence, naturally must produce his charter party to show the mutual duties in respect to the equipment, maintenance, and seaworthiness of the vessel. The charter party introduced by the claimant (professedly only to prove the owner's relation to the crew), does also show a warranty by Mr. Knott, the shipowner and claimant (fol. 438) and an undertaking to maintain the vessel in a thoroughly efficient state (fol. 440).

The relation of Mr. Knott, the owner, to the master is raised by the claimant. In a suit *in rem* for cargo damage, the private agreements between shipowner and the charterer are not ordinarily material. The cargo looks to the vessel, which is bound by the acts of its officers lawfully in charge. Their log books, written on the voyage, are records available to prove neglect in the bailment. The cargo rights in a suit *in rem* are not dependent in the least on the point whether Mr. Knott appointed the officers. Mr. Knott was not sued, but only the vessel,

When, however, the shipowner comes into the litigation and sets up the charter party, which is also the instrument giving his agents authority to sign bills of lading, he shows by this very document his duties in maintaining the ship in a fit condition. Having proved them, he cannot now deny that they form part of libellant's chain of title.

While the holders of this bill of lading may not be strictly in privity with all the terms and obligations of the charter party, its duties have incontestably become the standard of due diligence to be exercised by Mr. Knott, the owner. He has himself expressly undertaken to do the very things that were incumbent on him as a vessel owner.

THE ARGUMENTS THAT THE DEFECTS IN THE CARIB PRINCE WERE TRIFLING.

The contention by the advocate for the appellee as to the rivet holes was two-fold (1) that the Courts below have not found that these holes were untrue so as materially to affect the strength of the rivet (brief, 1897, p. 14); (2) that such holes into a water tank are trifling and do not rise to the dignity of real unseaworthiness (brief, 1897, pp. 18, 19).

Both of these ingenious attempts to minimize the cause of all this damage are met by one quotation from the opinion of Judge Shipman, in the Circuit Court of Appeals, who found

"that it was a latent and undiscovered defect in the hull of the vessel at the commencement of the voyage from Trinidad; *that consequently the vessel was not, at said time, seaworthy, and that the injury occurred solely through this unseaworthiness*, and not by reason of filling the tank injudiciously." (*Record*, p. 212.)

Water ballast tanks are comparatively recent. By this device, the draft, trim and stability of the ship are quickly adjusted. The water is not merely carried *horizontally* between the double bottoms, where its presence *below* the cargo is less dangerous. For greater facility to balance other loads, this weight and pressure of sea-water is pumped into receptacles, between *perpendicular* bulkheads, rising high above the levels of dry cargo in adjoining holds. These tanks, thus designed solely for the economy and convenience of the shipowner, should be amply protected. Weakness or defects, however slight, may yield to the hydrostatic pressure intensified by violent surges of these masses of water, as the ship rolls and plunges in a seaway.

Mr. Martell, a distinguished authority, stated before the British Institution of Naval Architects in 1883:

"In merchant ships, where the tanks are fitted, we have to be exceedingly careful to see that they are strengthened up in a proper manner. *In the early tanks that were fitted, where the bulkheads had merely angle irons to stiffen them, and there were angle iron beams at the top of the tank, it was found from experience that those tanks were perfectly incapable of withstanding the concussions of water where there was a little leakage* and care was not taken to fill the tank up. Sometimes there is a danger in that, occurring where the ship is trimmed by the stern, and the tank is run up; unless you fill it from the top, there is a difficulty in getting it brim full, and where these large masses of water are moved about in this way, it is an element of exceeding danger. There is consequently great necessity, where tanks are fitted for the purpose of carrying water ballast in that way, to exercise the greatest care to see that they are completely filled and kept filled. We have in all these cases required that there should be a partition bulkhead at the middle line to prevent the danger that would arise from the wash of the water from one side of the tank to the other."

Transactions Inst. of Naval Architects, Vol. XXIV., p. 185.

All water pipes, tubes and valves leading near dry cargo require extreme care. How much less are the possibilities of damage from a water pipe than from this fore peak tank with its volume undivided by a fore and aft bulkhead—its after support a long cross bulkhead held by badly riveted ties and straps.

Some instances of damage from internal pipes and tanks are:

Cap of bilge pump defective,

The *Edwin I. Morrison*, 153 U. S., 199.

Water-closet pipe not cased properly,

Gilroy *v.* Price [1893] App. Cas., 56.

Water-pipe leading to ballast tank broken,

The *Glenmavis*, 69 F. R., 472.

Water-tank leaking,

The *Castleventry*, German Court, 69 F. R., 475, note.

On further hearing of the case, the Imperial Court, on appeal, held the vessel liable for fault in filling the tank with a manhole open.

Hanseatische Gerichtszeitung, 1895, p. 85.
Appendix, pp. 68–85.

Not closing feed cock of ballast tank,

Colignon *v.* Smit (the *Pieter de Coninck*) Jurisprudence d'Anvers, 1892, p. 315.

Leaking tank,

Rondeau *v.* Bergwitz, Appendix, p. 44.

Feed pipe of tank broken,

Apenrader Co. *v.* Steamship Co., Appendix, p. 86.

Discharge pipe of condenser not closed,

The Versailles, Appendix, p. 20.

Defective rivet hole in tank,

The *Bergenseren*, 36 F. R., 600.

Stanchion bolt in top of ballast tank giving way,

The *Exe*, 57 F. R., 399.

These illustrate the dangers and damages which experience has shown may come from water pipes and the accumulations of that element in tanks.

If the shipowner thus chooses to admit the sea within the hull of his ship, to save the expense of the old and slow methods of carrying stone or earth ballast—which, being dry, was not harmful to his cargoes—certainly he must take precautions commensurate with the risk he thereby assumes. The cargo is generally well protected from small leaks through the skin of the ship. Dunnage, water clearances to the pumps, and cargo floors, ordinarily serve to remove such water without allowing it to reach the goods.

If the shipowner carries eighty-three tons of water alongside and above dry cargo, which is protected by no dunnage against the tank, nor adequate water clearances beneath, can he afterwards urge that holes letting this water through to the cargo are but trifling, and that his ship was fit and legally seaworthy in spite of these apertures in the tank bulkhead?

The tank in question is in a part of the ship requiring exceptional structural strength. The very side which leaked is the collision bulkhead. It is intended to serve as a barrier and protection against the sea in case of damage or destruction to the stem and bow plates. Vice of construction here is never trifling. On this bulkhead the ship's very life may depend.

Where the bulkhead of a forepeak tank was improperly opened by raising a sluice, the Tribunal at Havre condemned the shipowner for the resulting cargo damage. The Court described the protection which the collision bulkhead is designed to give, the decree saying:

"That it appears from the foregoing that at first the water introduced itself into the forepeak only, that is to say, into a water-tight compartment, *arranged exactly to serve as a stopper (tampon) in case of collision, and capable of being invaded by water, without the safety of a ship, normally* laden, being thereby compromised."

The ship *Timor*, Revue Int. du Droit Maritime, Vol. X., p. 591.

THE DUTY TO TRY THE TANK BEFORE THIS VOYAGE BEGAN.

After the terrific hurricane, which the vessel had encountered on her outward voyage, a special examination of this bulkhead became necessary. In appellee's 1897 brief, p. 15, it is said that

"this storm affords libellant a text for preaching a sermon upon the duty of minute examination of the rivets of the vessel, and the application of the hammer test to each rivet, in every case after a steel steamer has passed through a storm."

This is not appellant's position.

Suppose a cooper have a cask which by strain or damage he thinks may be in danger of leaking, shall he beat a tattoo at every hoop to see that they are in place, and call such a performance a test that the staves are water tight? On the contrary, the doubt is settled by the simple expedient of filling the cask with water.

This water test was not used. It is the natural and prescribed means of trial and proof of such a tank, when originally constructed. After a hurricane surely the same quick and sure test should be resorted to, with the empty ship in port,

before the tank has a chance to leak into dry cargoes. The failure to make this water test is the charge of appellant (Brief 1897, p. 14). As the Court of Paris say, such neglect to have bulkheads made perfectly water tight after a storm—

"Can only be charged to the company which, *forewarned by the log-book, that the passage from Colon to Marseilles had been a bad one*, should, before letting out their ship, have had all parts of her examined, and had necessary repairs done before proceeding to load her" (Appendix, pp. 26, 27).

THE LAW APPLICABLE TO BALLAST TANKS IN SHIPS HAVING DRY CARGO.

The obligation resting on a cooper to have tight casks is primarily in order to save the loss of the liquids. His duty was a strict one, even considering merely the contents of the barrel. If a cooper made a barrel for such purpose, he was bound not only to have his own work free from fault, but even to know that the wood he used was without defect.

Thus Pothier says, a cooper is liable if the casks he makes are of bad wood, and he cannot be allowed to say he was ignorant of this vice, "car sa profession l'obligeoit à connoître la qualité du bois qu'il employoit."*

Traité du contrat de Louage, § 119 (Paris, 1778).

This was not only the rule where the liability was enforced against the *maker*. He who hired out a wine jar (*dolium*) which had a defect so that it leaked, was liable for such defect, whether he knew it or not. Thus Ulpian:

"Si quis dolia vitiosa ignorans locaverit, deinde vinum effluxerit, tenebitur in id quod interest, *nec ignorantia ejus erit excusata*."

Dig. lib. XIX., title II., 19, § 1.

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* In another treatise, Pothier applies this identical principle to a ship, saying:

"Le maître est garant des vices de son vaisseau * * * Il en est tenu, quand même il allégueroit avoir ignoré le vice; car sa profession l'oblige à s'y connoître & à s'en informer. Tout ceci est conforme aux principes que nous avons établis dans notre Traité du contrat de louage, part 2, chap. 1, sect. 4, sur la garantie des vices de la chose louée que en empêcherent l'usage."

Supplément au Traité du Louage, ou Traité des contrats Maritimes, vol. 1, pp. 28, 29 (ed. Paris 1774).

The same rule must apply to a ballast tank. It is always under the shipowner's control. A leak from it is certain to do damage. Proper dunnage and good limbers may reduce its extent, but the danger is nevertheless constant. By taking such receptacles into the structure of the ship, the shipowner has also imported into his duties the salutary rule of the ancient law that the hirer out of such casks and jars cannot plead ignorance.

Therefore, in 1891, the Hanseatic Court of Hamburg declared a special rule for such internal tanks and pipes. The shipowner is to attend to it, "that all those arrangements, which serve to convey water thorough the cargo space, are in an *absolutely* seaworthy condition." Appendix, p 93.

The danger and corresponding duty of the shipowner require nothing short of the absolute warranty of tightness at the beginning of the voyage—compliance with which is readily established by merely filling the tank before loading.

THE DAY WHEN THE LEAK WAS DISCOVERED.

The learned advocate for the appellee at the very conclusion of his brief says :

"It was found in both Courts that the leak was discovered *on the next morning*, after the tank was filled" (brief, 1897, p. 52).

This is not exact. The opinion of Judge Shipman is :

"And the next morning, *or the morning after*, the tank was found partially empty" (*Record*, p. 212).

On such an issue the log books must decide.

Chief Officers log, *Record*, p. 161.
Chief Engineer's log, " pp. 162, 164.

The master confirms this entry, that the tank was filled on the 3d, and the leak found on the 5th.

Legge, *Record*, p. 27, fol. 80.

This interval, covering all day of September fourth, proves not only the neglect of the ship's officers in their care of the cargo, in not observing its damage, but it shows that the effect

of the first injury must have been enhanced by the slow and increasing accumulation of water through the stoppage of the limber boards.

THE DISTINCT CAUSES OF DAMAGE.

The causes of the libellant's damage are:

1. The vice of construction with a defective rivet.
2. The failure to test the ship's tank after the most terrific hurricane in Captain Legge's long West India experience.
3. The failure to have the limber boards in proper condition to perform their function as water clearances.
4. Proceeding to sea in a trim contemplating the use of the tank.

   All of which appertain to the shipowner himself.
5. Filling the tank without having been properly tested.
6. Not sounding the cargo hold, nor examining the tank itself for an interval of 32 hours after the tank had been so filled.

   Which last neglects are claimed to have been only faults of the shipowner's servants.

EXCEPTIONS INSERTED IN BILLS OF LADING CONSTRUED AGAINST THE SHIPOWNER.

Without repeating the arguments already submitted that this cause of damage was in no sense a latent defect, I desire to call the attention of this Court to the fundamental rule of construction of such exceptions in a bill of lading, to which the learned Courts below have not conformed.

This rule is thus formulated:

"Exceptions in a bill of lading or charter-party inserted by the shipowner for his own benefit are unquestionably to be construed most strongly against him."

Compania la Flecha *v.* Brauer, 168 U. S., 104, 118, and authorities cited.

Such exemptions are to be taken "*dans le sens le plus strict,*" "*le plus étroit*"—being in derogation of common law rights.

Revue internationale du droit maritime, Vol. III., p. 140; Vol. X., p. 207.

The mere phrase "latent defects" can be construed in obedience to this rule. Such a construction, restricted to the occurrences on the voyage, would not annul the owner's primary obligation of seaworthiness. The suggestion that latent defects are so indefinite in their origin that *ex necessitate* the term must go backward and exempt the shipowner for a vice in construction of the vessel seems contrary to all canons of interpretation of these contracts.

The argument in the Court below on this point is submitted to be inconclusive.

Because a defect at one time may be undiscoverable, it does not follow that after it is manifested by the resulting damage on the voyage, its *origin* would be still unknown, so that it must be presumed to have existed at the time of shipment. On the contrary, broken shafts generally disclose in the fracture clear indications whether the defect has been a congenital one, or has developed by recent strain or molecular change in the metal. The same would be true of a crack or decay in a mast. Hidden defects, therefore, may begin and develop *after* shipment as well as before shipment. An exception of defects after shipment may be effective. The inclusion of all other hidden defects that may have existed since the vessel was launched, cannot therefore be presumed merely from the term latent defects.

There is another reason why the shipper should not be presumed to have accepted and agreed to the term latent defects in the exceptions of his bill of lading, if it has the extended meaning now claimed.

The warranty of fitness of a carrying vessel, like the warranty of title in a sale of chattels,* is taken for granted. It is

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* "It is like the warranty of title, never necessarily embraced in terms in the contract of sale of goods, or on the warranty of their soundness, goodness or other qualities. As well might a man, who was selling property, not his own, reserve the right to cheat the vendee in such sale, as for a carrier to reserve the right to keep his road unsafe, or to send his passenger by an unsafe conveyance."—E. Darwin Smith, *J.*, in Perkins *v.* New York Central Railroad Co., 24 N. Y., 217.

not even a subject of question to an ordinary shipper. By putting the vessel on the loading berth, and soliciting the goods of the public for transportation, the carrier holds out his ship as seaworthy. After goods are entrusted to him on the faith of this implied fitness of his ship, his duty is to receipt for them, stating the exceptions which may excuse non-delivery. While he may enumerate all sorts of perils in the future, he is estopped to go back and deny his own representation of the fitness of his ship. Certainly there is no moral right to attempt this by a *latent exception* buried in a mass of clauses relating to future perils and occurrences of the voyage.

See remarks of Lush, J., in Crooks *v.* Allan, 5 Q. B. D., 40.

The rule that such exceptions are construed prospectively, and never to cut off the owner's primary fundamental duty, accords with the spirit of commercial dealing, as well as with accepted principles of the interpretation of carrier's contracts.

Tattersall *v.* National S. S. Co., L. R. 12 Q. B. D., 297.

THE DIFFERENCE BETWEEN THE DUTIES OF SHIPOWNERS, AS SUCH, AND THEIR LIABILITY FOR ACTS OF THEIR SERVANTS.

The distinction is controlling between the primary and direct obligation of the shipowner for the fitness of the vessel, and his responsibility for the acts of his master and crew in their relation as servants removed from the supervision of the owner's land agents.

This distinction goes to the root of the whole question of the right to contract against negligence. Although now obscured in recent English decisions, it is still recognized on the Continent, and forms the dividing line between exemptions from liability that are regarded as reasonable and therefore valid, and those which are forbidden as against public order. This is so well recognized in France that the ordinary sweeping clauses of a bill of lading are deemed to be ever impliedly checked and circumscribed by this basic obligation of the shipowner to have and maintain his ship in a fit state.

Accordingly the Antwerp Congress of 1885, in discussing

this duty of seaworthiness, had no call to demand that the owners should be prohibited against contracting against their *own* acts, as to seaworthiness, since such stipulations were already held void by an established principle of continental jurisprudence.

But even the remote and consequential liability for the acts of the shipowner's servants in special departments of the ship often impairs the fitness of the vessel. Being near the dividing line, they were therefore prohibited. The shipowners were not to relieve themselves by any contractual exemption "for any acts of their captains or officers tending to compromise the *perfect condition* of seaworthiness of the ships."

No one appeared bold enough, then, to claim that the owner's own acts should be excepted in the bill of lading. The suggestion of the advocate for the appellee that by this provision the owner's right is left unaffected to contract for immunity for his own acts (1897 brief, p. 40) is a misapprehension.

In illustration of the distinction between the scope of negligence clauses in general, and such exemptions when applied to the fitness of the ship itself, certain foreign authorities with translation are inserted *in extenso* in the appendix to this brief. In every case of unfitness of the vessel, however slight, the owner is shown to be deprived of the protection of general exceptions in the bill of lading.

Thus the ship *Versailles* of the Compagnie Générale Transatlantique arrived at Marseilles from Colon having strained her bulkheads in a storm. Workmen from shore left the discharge pipe of the condenser open—a small obstruction having prevented complete closing of the valve (pp. 22, 23). The vessel gradually settled as she took in coal, the discharge pipe was thus submerged, water entered, flowed through the defective bulkheads, and damaged a cargo of sugar and coffee.

The Court of Paris held the owner liable as responsible for the acts of the master in port, as well as for neglects by the shore mechanics (Appendix, pp. 28, 29), and therefore refused to allow the bill of lading exemptions to be interposed, rightly calling them "*exorbitante du droit commun.*"

The Court of Cassation was still more rigorous. In the assessment of damages against the same vessel, the defense pleaded the customary and not unreasonable exemption limit-

ing damages to the invoice value at the port of loading. The Court held this could not restrict the damages due for the fault of the owner respecting his obligation to have a fit ship, and hence that such damages must be paid in full. (Appendix, pp. 30, 33.)

Even so small a matter as a needed lock on an iron sluice, leading into the fireroom could not in France be put off upon the captain and engineers. This failure in the proper equipment was held a default chargeable personally to the owner. Hence he was entirely precluded from invoking for his benefit the clauses of the bill of lading and charter-party. (Appendix, pp. 36, 37.)

Similar doctrine obtains in this country.

Wheeler on Carriers, p. 77.

Both in Belgium and Germany the highest courts hold that the shipowner cannnot excuse himself because his vessel has a class at Lloyds (App., pp. 47, 67). Such a certificate avails nothing against the fact of a leaky tank which saturates cargo by means of defective limbers (App., pp. 44–49). Even water entering by sea peril, but not kept down by the pumps, which stop on arrival in port, is held in Belgium not protected by a negligence clause (App., pp. 50–55). And the Brussels court also holds that it is a personal fault of the owner, against which his bill of lading cannot avail, not to prohibit the master from loading cargo in a hold unfit to receive it by reason of its nearness to the fireroom (App., pp. 56, 59).

The German decisions are equally strict, especially as to tanks and their pipe connections (App., pp. 68, 86). The owner's duty with reference to defects in such pipes, is to remove outer coverings, even sockets and casings, to make certain that the pipe is water-tight, if it lead through a cargo compartment.

Apenrader Co. *v.* German S. S. Co. (App., p. 86).

WHAT ARE LATENT DEFECTS IN A CARRYING VESSEL.

If, by proper evidence of assent, the absolute warranty of seaworthiness is modified, what is the new liability of the shipowner thus assumed toward cargo? "Latent defects" is a

technical expression in constant use. The carrier of *goods* warrants his vehicle to be in fact seaworthy, or landworthy, as the case may be. The carrier who is not held so strictly is the carrier of *passengers*. He is excused from liability for latent defects. When, therefore, the carrier of cargo talks of latent defects, he seeks to put his liability for the condition of his ship on the footing of a carrier of passengers. Instead of absolutely warranting its perfect condition of seaworthiness, he asks to be allowed to stand relieved from latent defects, like a passenger carrier.

The term "latent defects" therefore would have the same construction in such a contract for carriage of goods, that it already has received by a long course of judicial decision with passenger carriers.

The rule as to such defects is well settled.

They are not merely concealed, hidden blemishes or unseen imperfections. They must be such as are undiscoverable by any practicable mode of examination. As applied to a vehicle used by a common carrier a latent defect is limited to that which could not be detected or avoided by any means which science has furnished. Bad workmanship cannot be so covered up as to amount to a latent defect to excuse a common carrier.

In an early case in England, the defense of latent defect in the construction of a stage coach was rejected. The Court said:

"The injury in the present case appears to have been occasioned by an original defect in construction; and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy."

Sharp *v.* Gray, 9 Bing., 457.

In a Massachusetts case, such a defect was received as a defense to a passenger carrier, if it were clearly shown to have been impossible of detection.

"That if an accident happens from a defect in a coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason

of such accident. On the other hand, where the accident arises from a hidden and internal defect *which a careful and thorough examination would not disclose, and could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then* the proprietor is not liable for the injury."

Ingalls *v.* Bills, 9 Metc., 15.

In Readhead *v.* Midland R. R. Co.,4 Q. B., 379, the carrier was held not responsible for a latent defect which *neither he nor those who made the carriage* could by proper care have prevented or detected.

In Francis *v.* Cockrell, L. R. 5 Q. B., 184, the requirement was:—"all the examination which human skill and foresight could make."

In the later case of Hyman *v.* Nye, 6 Q. B. D., 685, 687, the accident to excuse the carrier must *not be "preventable by any care and skill."*

In a leading New York case, Judge Selden reasoned on the improbability of such a defect being shown.

"Nothing can exempt him from this responsibility but the existence of some latent defect, which no reasonable degree of human skill and foresight could guard against, and this obligation extends to every species of appliance belonging to the carrier and used by him in the business in which he is engaged. Consequently whenever it appears that the accident occurred through some defect in the vehicle or other apparatus used by the carrier, a strong presumption of negligence arises founded upon the improbability of the existence of any defect which extreme vigilance aided by science and skill could not have detected."

Curtis *v.* Rochester & Syracuse R. R. Co., 18 N. Y., 534, 586.

Of a river steamboat the New York Court of Appeals said:

"If a defect existed which could not have been avoided or remedied *by any means which science had furnished or disclosed*, the defendant should have employed such means, though not generally used."

Caldwell *v.* New Jersey Steamboat Co., 47 N. Y., 289.

In a leading Massachusetts case, Mr. Justice Gray, then Chief Justice of the Supreme Court of that Commonwealth, said:

"The corporation was doubtless obliged to use the utmost care consistent with the nature and extent of its business, in providing a proper switch, but it was not responsible for hidden defects which could not have been discovered by the *most* careful inspection."

Ladd *v.* New Bedford R. R. Co., 119 Mass., 412.

A late statement of the rule in New York is:

"This duty is not discharged without the utmost care and diligence which human prudence and foresight will suggest to secure the safety of its passengers. And this vigilance is to be exercised by the company to see that its road and appliances used in operating it are and remain in good condition and free from defects; and a latent defect which will relieve it from responsibility, is such only as no reasonable degree of human skill and foresight could guard against."

Palmer *v.* The Delaware & Hudson R. R. Co., 120 N. Y., 170.
See also Robinson *v.* N. Y. Central R. R., 20 Blatch., 338.
Bevan on Negligence, Vol. 2, 1150–1154 (2d ed.).
Thomas on Negligence, p. 227.

A late author states the rule as follows:

"Both in America and England, the decided weight of decision holds the carrier liable for the negligence of the manufacturer, where the passengers' safety is thereby imperiled."

Ray, Negligence, Imposed Duties, Carriers of Passengers, p. 57 (Ed. 1893).

THE APPLICATION OF THESE PRINCIPLES TO THE CARIB PRINCE.

Applying these principles to the case at bar, it seems clear—

(*a.*) That the term latent defect, as employed in the bill of lading, must be reconciled with the owner's obligation and warranty of seaworthiness.

(*b.*) A latent defect is not a vice of construction, even if it be afterwards concealed during the process of construction.

(*c.*) A latent defect may be defined as one which from its nature is not discoverable by any of the practicable modes of examination of the object in question. If it is, or has been, capable of discovery, by such examination, then it is not latent.

Neither is it latent, merely because it is not obvious, or because it may be overlooked without negligence.

(*d.*) The defect in the condition of the bulkhead with leaky rivets cannot be termed latent, within the bill of lading, merely because the defect was not found at the prior water test at the time of building.

(*e.*) The time to try the bulkhead by a proper test was when the vessel had passed through the terrific hurricane—and no such test was then made.

(*f.*) The burden of bringing the damage within exceptions of the bill of lading, is on the claimant.

(*g.*) There were not the elements of a latent defect in the vice of original construction, the weakness and leak developed by the hurricane, the bad trim of the ship, or the closed limber boards.

(*h.*) The damage, therefore, does not fall within any valid ground of exception. The vessel is liable for her defective condition.

HARRINGTON PUTNAM
Advocate

Dated February 1898

Appendix.

French authorities..... pp. 20–43

Belgian " ..... " 44–59

German " ..... " 60–95

FRENCH AUTHORITIES ON CLAUSES OF BILLS OF LADING PURPORTING TO RELIEVE SHIPOWNERS FROM LIABILITY FOR THEIR OWN ACTS.

"743. Les clauses des connaissements vont souvent plus loin que les précédentes ; elles tendent à exclure la responsabilité elle-même. On peut distinguer : 1° celles qui stipulent la non-responsabilité du propriétaire du navire à raison des fautes du capitaine ou des gens de l'équipage ; 2° celles qui stipulent la non-responsabilité, soit du propriétaire, soit du capitaine à raison de ses propres fautes. La validité même de ces clauses est contestée. Aussi est-il indispensable d'examiner si les clauses de la première ou de la seconde espèce sont valables. Il est facile d'apercevoir que les secondes ont un caractère plus exorbitant que les premières, par cela même que les secondes ont pour but d'exclure pour une personne la responsabilité de ses propres fautes, tandis que les premières tendent à empêcher une personne (l'armateur) d'être responsable des fautes de ses préposés (capitaine et gens de l'équipage). La jurisprudence française admet la validité des clauses de la première sorte qui sont, du reste, de beaucoup les plus fréquentes, et prononce la nullité de celles de la seconde."

Traité de Droit Maritime, par Lyon-Caen et Renault, vol. 1, p. 504 (Paris, 1894).

"Nous croyons donc que tous les arrêts rendus concordent parfaitement. La clause d'exonération ne vaut jamais que pour renverser le fardeau de la preuve, lorsqu'elle s'applique aux fautes personnelles ou à celles des préposés terrestres. Elle est pleinement efficace, en tant qu'elle écarte la responsabilité de l'armateur pour les fautes du capitaine ou des gens de l'équipage, comme nous aurons à le démontrer.

C'est ainsi que le Tribunal civil de Tunis jugeait, le 29 déc. 1893, que l'armateur ne pouvait s'exonérer de la responsabilité des fautes commises par son agent au port de débarquement."

Boutard, Des Clauses de Non-responsabilité, p. 273 (Paris, 1896).

Bills of lading clauses often go further than the foregoing.* They tend to exclude liability itself. One may distinguish: first, those which stipulate for the shipowner's non-liability for faults of the master or crew; second, those which stipulate for non-liability either of the owner, or of the master, for his own faults. The validity even of these clauses is disputed. It is therefore essential to examine whether the clauses of the first or second class are valid. It is readily perceived that the second are of a more exorbitant character than the first, because the second aim to discharge a person from liability for his own faults; whereas the first tend to prevent a person (shipowner) from being liable for the faults of his agents (master and crew). French jurisprudence recognizes the validity of clauses of the first kind, which are also much more frequent, and decrees the nullity of those of the second.

We believe that all these decided cases are in perfect accord. The clause of exoneration can never go further than shift the burden of proof, when it is applied to personal faults, or to those of the land agents. It is fully effective in so far as it discharges the liability of the owner for the faults of the master or the crew, as we shall proceed to show.

This is also what the Civil Tribunal of Tunis decided the 29th of December, 1893, that the owner cannot free himself from liability for faults committed by his agents at the port of unloading.

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*In the preceding sections, the authors had discussed the clauses "weight unknown," etc., also the provisions limiting the amount of damages recoverable.

COUR DE CASSATION.—CHAMBRE DES REQUETES.

(18 février 1889.)

ARRÊT

LA COUR,

Sur le moyen unique tiré de la fausse application des articles 221, 222, 229 C. com., de la violation des articles 1134, 1142, 1146 et 1382 C. civ., 1315 et suivants du même code, des règles de la preuve et de l'article 7 de la loi du 20 avril 1810 :

Attendu qu'il résulte des constatations de l'arrêt attaqué que l'avarie d'une partie du maïs transporté par le navire *le Cid* ne peut être attribuée à un vice propre de la marchandise ; que cette avarie est le résultat des appareils à vapeur tels qu'ils ont été installés à bord par le fait des armateurs ;

Qu'il ressort avec évidence des constatations des experts que les installations dudit navire étaient imparfaites et vicieuses dans les parties avoisinant les marchandises, en tant que ces parties étaient destinées à recevoir des maïs sur le navire affrêté pour transporter un plein et complet chargement de cette marchandise ;—Que, par suite, l'arrêt déclare que les armateurs ont commis une faute, laquelle a consisté à louer aux chargeurs un instrument de navigation insuffisamment aménagé pour remplir l'objet du contrat ;—Que l'arrêt dispose, en outre, que le capitaine n'a commis aucune faute soit comme arrimeur, soit comme navigateur ;

Attendu qu'en se plaçant au point de vue de la faute personnelle des armateurs, et appréciant souverainement la clause d'exonération du connaissement, l'arrêt déclare que cette clause, invoquée par les armateurs, excepte taxativement les dommages dus à une absence de contrôle de ceux-ci ; que les fautes dont l'armateur s'est exonéré sont celles qui, d'après ladite clause, ne résultent pas d'un manque de soin et de diligence de la part des propriétaires du navire.

Qu'en confirmant, dans ces circonstances, les jugements des 21 juin et 19 juillet 1886, l'arrêt attaqué, dont les motifs expliquent et justifient suffisamment la décision, n'a violé ni faussement appliqué aucun des textes invoqués,

Rejette.

Du 18 février 1889. Ch. req. MM. Bédarrides, pr.; Rivière, rap.; Petiton, av. gén., c. conf.; André Morillot, av.

(*Revue internationale du Droit maritime*, t. IV., p. 629.)

COURT OF CASSATION—CHAMBER OF REQUESTS.*

February 18th, 1889.

DECREE.

THE COURT:

Upon the only argument drawn from a false application of articles 221, 222, 229, of the Commercial Code, regarding the violation of articles 1134, 1142, 1146 and 1382 of the Civil Code; 1315 and following of the same code, of the rules of proof and of article 7 of the law of April 20th, 1810;

Whereas, it results from the findings of the decree attacked, that the damage to a lot of corn carried by the vessel, the *Cid*, cannot be attributed to vice of the goods; that this damage is the result of steam equipment as put into the vessel by the owners; that evidence drawn from the verifications of experts shows that the equipment of said vessel was imperfect and vicious in the parts of same which were near the cargo, inasmuch as these parts were intended to receive corn in a vessel chartered to carry a full and complete cargo of that merchandise; that, in consequence, the decree declares that the owners have committed a fault, which consists in hiring out to shippers an instrument of navigation insufficiently equipped for fulfilling the object of the contract. That, the decree finds besides that the master has committed no fault, either as stevedore or as navigator;

Whereas, regarding the owners' personal fault, the decree below, being final in its appreciation of the exonerating clause of the bill of lading, declares that that clause, set up by the owners, excepts definitely damage due to an absence of control upon their part; that faults from which the owner is exonerated are those which, according to said clause, do not result from want of care and diligence upon the part of the owners of the vessel. That, while confirming, in these circumstances, the sentences of June 21st and July 19th, 1886, the decree attacked—the reasons for which sufficiently explain and justify the decision—has neither violated nor falsely applied any of the texts invoked,

Rejected.

February 18th, 1889. Chamber of Requests, Messrs. Bédarrides, President. Rivière, Reporter. Petiton, Advocate General, concurring. André Morillot, Counsel.

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* The Court of Cassation usually sits in three chambers, 1, *la chambre des requêtes* (which examines civil appeals to see if they are justifiable) 2, *la chambre civile*, which finally hear such civil appeals as the above allow, and 3, *la chambre criminelle*, which hears certain criminal appeals.

COUR DE CASSATION.—CHAMBRE CIVILE.

(16 janvier 1895.)

I.—*L'emploi d'une machine incapable par son mode de construction d'obéir, dans un délai normal et dans toutes ses positions, au commandement, constitue une faute personnelle à l'armateur, et dont il ne saurait être relevé par la clause d'exonération des barateries du capitaine et de l'équipage.*

II.— ....

ARRÊT

La Cour,

Sur le moyen unique du pourvoi :

Attendu qu'il est déclaré par l'arrêt attaqué que le naufrage du *Mohamed-el-Sadock* est résulté d'un retard de 30 à 35 secondes dans l'exécution de la manœuvre commandée de faire machine en arrière à toute vitesse ; que ce retard a été dû, non au mécanicien, mais à la machine elle-même, qui, "comme celles à deux cylindres dans lesquels la vapeur n'est introduite directement que par un seul, était sujette à des positions dans lesquelles elle ne pouvait partir ;" qu'il y avait donc vice propre de l'engin et faute caractérisée de la Compagnie d'avoir employé "une machine incapable, par la nature et l'imperfection de son mécanisme, d'obéir, dans un délai normal et dans toutes ses positions, au commandement du capitaine ;" que c'est là une appréciation souveraine ; qu'il est vrai que le pourvoi soutient que l'emploi de la machine en question n'a pu constituer juridiquement une faute, parce que le prétendu vice propre relevé "est une disposition intérieure, qui, dans l'état actuel de la science, est inhérente à toute machine de ce type, si perfectionnée et si bien construite qu'elle puisse être," ainsi que cela résulterait d'un rapport d'expert fait postérieurement à l'arrêt attaqué, dans une autre affaire relative au même naufrage et jugée par la même Cour d'appel ; mais que ce moyen est nouveau ; que la Cour de Montpellier, lors de l'arrêt attaqué, n'a pas été mise en demeure d'examiner et n'a pas pu vérifier l'exactitude du fait qui lui sert de base et que, dans la cause, on ne saurait invoquer une expertise qui y est étrangère ;

Rejette, etc.

(*Revue Internationale du Droit maritime*, t. X., p. 561.)

COURT OF CASSATION—CIVIL CHAMBER.

January 16th, 1895.

I.—The use of an engine which, by reason of its mode of construction, is incapable of obeying an order in a normal space of time and under all circumstances, constitutes a personal default of the owner, from which he cannot be relieved by the clause exonerating him from barratry of the master and crew.

II.—

DECREE.

THE COURT :

Upon the only ground for appeal :

Whereas, it is declared in the decree attacked that the wreck of the *Mohamed-el-Sadock* resulted from a delay of from 30 to 35 seconds in the execution of the manœuvre ordered, to "back at full speed"; that this delay was due, not to the engineer, but to the engine itself, which, "like those with two cylinders in which the steam is introduced directly through one only, was subject to positions in which it would not start"; that there was vice in the engine, and undeniable fault upon the part of the company for having used an "engine incapable, through the nature and imperfection of its mechanism, of obeying the orders of the master in a normal space of time and under all circumstances"; that this finding is final; that it is true that the appeal claims that the use of the engine in question could not constitute a legal default, because the pretended vice set up "is an internal arrangement which, in the present state of science, is inherent to every engine of this type, however perfected and well constructed it may be", as would appear from the report of an expert, made subsequent to the decree attacked, in another case relating to the same wreck and tried by the same Court of Appeals; but that this argument is a new one; that the Court of Montpellier, at the time of the decree attacked, was not compelled to examine into, and was not able to verify, the exactness of the fact which serves as its base, and that, in this suit, it would not be allowable to invoke expert testimony foreign to it;

Rejected, &c.

COUR D'APPEL DE PARIS.

(5 mars 1895.)

I.—*L'armateur est responsable du dommage causé aux marchandises de la cale par le fait d'une introduction d'eau, pendant le chargement, par les tuyaux de décharge, si cette introduction a eu pour cause la non-fermeture des cloisons et des portes étanches, le capitaine ayant l'obligation, lorsque le navire est immergé, de veiller à cette fermeture faute de pouvoir s'assurer si les soupapes des tuyaux, lorsqu'elles sont abaissées, sont ou non closes hermétiquement.*

II.—*La clause du connaissement qui exonère l'armateur des fautes du capitaine n'est pas applicable aux fautes commises au port d'attache par le capitaine agissant sous la direction et le contrôle de l'armateur.*

ARRÊT

La Cour,

Considérant qu'il résulte des faits, circonstances et documents de la cause, ainsi que le reconnaissent expressément les parties elles-mêmes, que dans la nuit du 14 au 15 mars 1892 le steamer *Versailles*, appartenant à la Compagnie Transatlantique, étant alors à l'ancre dans le port de Marseille, s'échoua sur le fond par suite de l'introduction de l'eau dans le navire par le tuyau de décharge ou condenseur resté ouvert, ce qui a causé l'avarie des marchandises appartenant aux appelants qui en demandent réparation ; que pour reconnaître les causes de cet événement et les responsabilités qui en résultent, il est nécessaire de rappeler que le navire, venant de Colon, est arrivé en rade de Marseille le 13 mars 1892 au matin ;

Que ce navire devant repartir le 18, on procéda immédiatement à son déchargement et en même temps à l'embarquement du combustible ;

Que le lundi soir, le navire avait débarqué 450 tonnes de marchandises ; qu'il en restait 550 tonnes dans les cales et que, de plus, son water-ballast contenant 475 tonnes, était complètement rempli ;

Que le travail fut interrompu à l'heure de la cessation du travail, tandis que l'embarquement du charbon continua toute la nuit ;

Que dès le lundi 14 à 9 heures du matin, une équipe

COURT OF APPEAL OF PARIS.

(March 5th, 1895.)

I.—The owner is responsible for damage caused to goods in the hold, from the entrance of water, during the loading, through the discharge pipes, if this entrance has been caused by the bulkheads and watertight doors not having been closed, the master being under obligation when the ship is immersed, to look after this closing, if he is unable to assure himself whether the valves of pipes, when they are down, are hermetically closed or not.

II.—The clause in the bill of lading which exonerates the owner from defaults of the master, is not applicable to defaults committed at the home port by the master acting under the direction and control of the owner.

DECREE.

THE COURT.

Considering that it results from the facts, circumstances and documents, as the parties themselves expressly recognize, that during the night of the 14th to 15th March, 1892, the steamer *Versailles*, belonging to the Compagnie Transatlantique, being then at anchor in the port of Marseilles, grounded on the bottom through the introduction of water into the ship through the discharge pipe or the condenser left open, which caused damage to goods belonging to appellants who demand reparation ; that, in order to understand the causes of this occurrence and the responsibilities resulting from it, it is necessary to recollect that the ship coming from Colon arrived in the harbor of Marseilles on the morning of March 13th, 1892 ;

That, as this ship was to leave again on the 18th, they immediately proceeded with her discharge, and at the same time the taking on board of fuel ;

That, Monday evening, the ship had discharged 450 tons of merchandise ; that there remained 550 tons in her holds, and that, besides, her water ballast tank containing 475 tons was completely full ;

That the work [discharging] was interrupted at the hour for stopping work, while the taking on board of coal continued all night ;

That, at 9 o'clock in the morning of Monday the 14th, a gang of workmen belonging to the Marseilles agency of the

d'ouvriers appartenant à l'établissement que possède à Marseille la Compagnie Générale Transatlantique fut envoyée par ladite Compagnie, sous la conduite et la direction d'un chef d'équipe spécial, à l'effet de procéder à l'ouverture, à la visite du condenseur et aux réparations d'entretien, le navire ayant fait, suivant les indications consignées sur son livre par le capitaine, une très pénible traversée ;

Que le 14 au soir, cette équipe quittait le travail laissant le condenseur ouvert (p. 2 du rapport) ;

Qu'il résulte des autres constatations de l'expertise que les portes étanches placées entre la machine et la chambre de chaufferie avaient également été laissées ouvertes, ainsi que celles également étanches de la soute à charbon, entre laquelle et le quatrième compartiment n'existe qu'une cloison étanche ;

Qu'il en résulte encore que l'une des soupapes destinées à fermer les tuyaux de décharge du condenseur n'ayant pu, par suite de l'interposition d'un paquet de joncs, s'appliquer exactement sur le seuil où elle devait reposer, une ouverture de 3 centimètres était restée béante et pouvait permettre, en cas d'immersion de ces tuyaux, à l'eau de mer de s'introduire dans le condenseur et au delà, à raison de l'ouverture des portes ci-dessus indiquées dans certaines autres parties du navire ;

Considérant, ceci exposé, qu'il est établi et non dénié que, par suite du chargement du charbon pendant toute la nuit du 14 au 15 mars, le navire s'enfonçant peu à peu dans l'eau, les tuyaux de décharge du condenseur furent immergés et la soupape de l'un d'eux n'étant point, ainsi qu'il a été dit plus haut, hermétiquement fermée, l'eau s'est précipitée dans le condenseur d'où elle s'est répandue par la porte étanche ouverte jusque dans le quatrième compartiment, où se trouve la cale, et a été refoulée jusque dans la cale arrière, où elle n'aurait pu se répandre si les cloisons qui séparent le premier compartiment de la chambre de la machine eussent été, comme elles auraient dû l'être, absolument étanches ou si le tunnel dans lequel l'eau qui s'échappe du condenseur a un libre accès pour se rendre à la mer, eût été lui-même en état d'étanchéité complète ;

Qu'il résulte donc de ce qui précède que la cause initiale de l'accident doit être attribuée à la non-fermeture de la soupape de l'un des tuyaux de décharge ; mais que ce fait, qui au surplus n'a point été la cause immédiate de l'échouement du

Compagnie Générale Transatlantique was sent by that Company under the conduct and direction of a special master workman, for the purpose of opening, examining and making any necessary repairs to the condenser, the ship having had a very hard passage, according to the master's entries in his log;

That in the evening of the 14th the workmen quit work, leaving the condenser open (page 2 of protest);

That it is shown by the other verifications of the survey that, the watertight doors placed between the engine and the fireroom had also been left open, as well as the equally watertight ones of the coal bunker, between which and the fourth compartment there is a watertight bulkhead only;

That, further, it appears that one of the valves destined to close the discharge pipe of the condenser could not come down exactly upon the sill where it ought to rest, on account of a bundle of cane which got interposed, and there remained yawning an opening of 3 centimeters which, in case of the immersion of these pipes, could allow the sea water to get into the condenser and beyond it, because of the opening of the doors above mentioned in certain other parts of the ship;

Considering, this being shown, that it is established and not denied that, through the loading of the coal the whole night of the 14th to 15th March, the ship settling little by little in the water, the discharge pipes of the condenser were immersed, and the valve of one of them, as stated above, not being hermetically closed, the water precipitated itself into the condenser, from whence it spread itself through the open watertight door into the fourth compartment, where the hold is, and was driven away back to the after hold, where it could not have spread itself if the bulkheads which divide the first compartment from the engine room had been absolutely tight, as they should have been, or if the tunnel through which the water which escapes from the condenser finds free escape into the sea had itself been completely watertight;

That it therefore results from that which precedes, that the initial cause of the accident should be attributed to the non-closing of the valve of one of the discharge pipes; but that this fact, which at the most was not the immediate cause of the grounding of the ship, may be considered as a matter of accident, because of the impossibility upon the part of the man

navire, peut être considéré comme un cas fortuit à raison de l'impossibilité où se trouve l'homme d'équipage chargé de l'abaisser de constater si la fermeture du tuyau est ou non complète et absolue ;

Considérant dès lors qu'il n'y a lieu ni en fait ni en droit de retenir ce fait comme ayant été la cause immédiate de l'événement dont s'agit ;

Considérant, en effet, que si, abstraction faite des circonstances ci-dessus énoncées, on suppose l'immersion des tuyaux de décharge du condenseur, l'une des soupapes n'étant pas hermétiquement fermée, l'eau se serait assurément précipitée dans le condenseur, mais elle aurait été confinée sans pouvoir se répandre dans les autres parties du navire, si les portes dont il a été ci-dessus parlé étaient restées fermées, et n'aurait pu ainsi, suivant le dire des experts, occasionner qu'un simple ennui ;

Qu'on ne peut donc rationnellement attribuer la cause immédiate et directe de l'échouement sur fond du navire qu'à la non-fermeture des portes étanches laissées ouvertes par l'équipe des ouvriers envoyés par la Compagnie Générale Transatlantique, et aussi, de toute nécessité, à la non-étanchéité de la cloison séparant la chambre de la machine du premier compartiment où se trouve la cale arrière, et vraisemblablement aussi au mauvais état du tunnel où se meut l'arbre de l'hélice ;

Qu'il y a lieu maintenant de rechercher si, en laissant ces portes ouvertes dans les conditions ci-dessus indiquées, les ouvriers envoyés par la Compagnie n'ont pas commis une faute lourde, de nature à engager directement la responsabilité de la Compagnie, ou si, tout au moins, il ne résultait pas, soit pour le capitaine, soit pour la Société, soit pour les deux simultanément, la nécessité de prendre certaines précautions spéciales et d'exercer une surveillance extraordinaire qui aurait pu incontestablement prévenir l'accident dont se plaignent les parties appelantes ;

Considérant sur ce point et étant admis qu'on ne peut, sur les navires les mieux organisés, se rendre compte quand les soupapes des tuyaux de décharge sont *abaissées*, si elles sont ou non hermétiquement fermées, l'armateur ou ses préposés, le capitaine ou les gens de l'équipage auxquels il commande ont pour premier devoir de prévoyance et de vigilance de supposer toujours, chaque fois qu'ils procèdent au chargement des mar-

entrusted with lowering it of ascertaining whether or not the closing of the pipe was complete and absolute ;

Considering, therefore, that there is no reason, either in fact or in law, to take this fact as having been the immediate cause of the occurrence in question ;

Considering, in fact, that, if leaving out the circumstances here above related, one supposes the immersion of the discharge pipes of the condenser, one of the valves not being hermetically closed, the water would certainly be precipitated into the condenser, but it would have been confined without being able to spread into other parts of the ship, if the doors mentioned above had remained closed, and thus according to the expert would have been able to cause a simple annoyance only ;

That one can only rationally attribute the immediate and direct cause of the grounding of the ship on the bottom to the non-closing of the watertight doors, left open by the gang of workmen sent by the Compagnie Générale Transatlantique, and as well, necessarily, to the bulkhead separating the engine room from the first compartment, where the after hold is, not being watertight, and as truly also to the bad condition of the tunnel in which the shaft turns ;

That there is reason to investigate whether, in leaving these doors open under the conditions above named, the workmen sent by the Company have not committed a grave default, so as to make the Company directly responsible, or whether, at least, there is not shown the necessity, whether upon the part of the master or upon that of the society, or both simultaneously, of taking certain special precautions and of exercising an unusual superintendence which would incontestably have foreseen the accident of which the appellants complain ;

Considering this point, and it being admitted that upon the best organized ships one cannot assure one's self whether or not the valves of the discharge pipes are hermetically closed when they are lowered, the owner or his representatives, the master or the crew which he commands, have as the first duty of foresight and vigilance to always suppose each time that they proceed to load merchandise or fuel, the discharge pipes may be submerged by the very fact of loading, and that they are not hermetically closed ;

That it was the duty of the special gang of workmen sent

chandises ou du combustible, que les tuyaux de décharge peuvent être submergés par le fait même du chargement, et qu'ils ne sont pas hermétiquement fermés.

Que l'équipe d'ouvriers spéciaux envoyée par la Compagnie sous la conduite d'un chef d'équipe pour ouvrir le condenseur et faire les réparations nécessaires, avait donc le devoir, après avoir ouvert les portes étanches ci-dessus indiquées, de les refermer, quelle que fût la durée du travail qui pouvait au surplus être confié à un seul chantier, ou tout au moins de s'assurer, comme l'ont pu faire très facilement les experts au cours de leur visite, si les tuyaux de décharge du condenseur dans lequel ils avaient dû pénétrer, étaient hermétiquement fermés ;

Que n'ayant pas pris cette précaution, alors qu'ils savaient indubitablement que le chargement du charbon devait continuer toute la nuit, ils devaient eux-mêmes, ou les ingénieurs de la Compagnie qui les avaient préposés au travail de réparations, recommander et même organiser une surveillance spéciale pendant toute la nuit, pour éviter l'introduction de l'eau dans le condenseur et par suite dans les autres parties du navire communiquant librement entre elles.

Qu'on peut même ajouter que cette surveillance spéciale faisait également partie des devoirs du capitaine, mais que les deux visites faites à minuit et 2 heures et demie du matin étaient évidemment insuffisantes ;

Qu'au surplus, la communication laissée libre entre le condenseur, la chambre des machines et la soute à charbon n'aurait peut-être pas à elle seule causé l'accident dont il s'agit, si les cloisons étanches qui existent entre la chambre des machines et le premier compartiment eussent été dans un parfait état d'étanchéité, aussi bien que le tunnel traversant ce premier compartiment qui avait été fortement endommagé pendant le voyage de Colon à Marseille, et dont les experts n'ont pu, par le fait de la Compagnie et malgré leurs recommandations de le laisser entièrement dégagé au moment de l'accident, ne saurait être imputée qu'à la Compagnie, qui, prévenue par la lettre du bord que la traversée de Colon à Marseille avait été mauvaise, aurait dû, avant d'armer son navire, faire vérifier toutes les parties du bâtiment et faire opérer les réparations nécessaires avant de faire procéder à son chargement (Art. 2 de la loi du 30 janvier 1891) ;

by the Company under the conduct of a master workman, to open the condenser and make the necessary repairs, after having opened the watertight doors above mentioned, to close them, whatever might have been the length of work which could at the most be confided to one shipyard alone, or at least to assure themselves, as the experts in the course of their visit have been able to do very easily, whether the discharge pipes of the condenser into which they must have penetrated, were hermetically closed ;

That, not having taken this precaution, when they undoubtedly knew that the loading of the coal was to continue all night, they should have themselves, or the engineers of the Company who had entrusted them with the repairs, should have recommended and even organized a special oversight all night, to avoid the introduction of water into the condenser and thence into other parts of the ship communicating freely with each other ;

That it may even be added that this special oversight was equally one of the duties of the master, but that the two visits made at midnight and at 2.30 in the morning were evidently insufficient ;

That, besides, the communication left free between the condenser, the engine room and the coal bunker might not of itself alone have caused the accident in question, if the water tight bulkheads which exist between the engine room and the first compartment had been perfectly water tight, as well as the tunnel passing through this first compartment which had been considerably damaged on the voyage from Colon to Marseilles, and which the experts were not able in spite of their recommendations to have left perfectly free at the time of the accident, through the act of the Company,—can only be charged to the Company, which forewarned by the log book that the passage from Colon to Marseilles had been a bad one, should, before fitting out their ship, have had all parts of her examined, and had necessary repairs done before proceeding to load her.

(Art. 2 of the law of January 30th, 1891.)

Considering that it results from all that which precedes that the grounding of the ship *Versailles* on the bottom, from whence the damage for which appellants demand satisfaction,

Considérant qu'il résulte de tout ce qui précède que l'échouement sur le fond du navire *Versailles*, d'où provient l'avarie dont les appelants demandent réparation, a pour cause directe et immédiate l'incurie, la négligence ou le défaut de vigilance des ouvriers spéciaux chargés par la Compagnie ou les ingénieurs à la tête de son établissement technique de Marseille, de faire certaines réparations techniques à ce navire ;

Qu'en admettant qu'il doive être simultanément attribué et au défaut de surveillance et à la négligence du capitaine, la Compagnie Transatlantique n'en serait pas moins personnellement responsable, d'abord comme y ayant personnellement, par elle ou ses préposés, directement participé, et ensuite *comme responsable des fautes commises par son capitaine au port d'attache du navire*, et agissant sous sa direction et son contrôle, et ne pouvant, dès lors, invoquer la clause d'exonération exorbitante du droit commun, insérée dans l'article 8 du connaissement ;

Que, dans ces conditions, il y a donc lieu de faire droit à l'appel et d'ordonner, la Cour ne trouvant pas dans la cause les éléments d'appréciation du préjudice dont la réparation est demandée, que cette évaluation sera faite après vérification par arbitre rapporteur conformément à la loi.

Par ces motifs :

Emendant, réformant et faisant ce que les premiers juges auraient dû faire,

Déclare la Compagnie Transatlantique responsable des avaries subies par les marchandises des appelants chargées sur le navire *Versailles* appartenant à ladite Compagnie.

Renvoie la cause et les parties devant Gautron, 13, rue Tronchet, que la Cour, à défaut d'entente entre les parties, commet pour l'examen des comptes, pièces et registres, dans les termes de l'article 429 C. pr. c., à l'effet d'indiquer et préciser le montant du dommage subi par les appelants dans l'accident du navire *Versailles* dans la nuit du 14 au 15 mars 1892 pour, sur le rapport de l'arbitre déposé au greffe de la Cour, être conclu et statué à ce qu'il appartiendra ;

Dit qu'en cas d'empêchement, il sera procédé au remplacement de l'arbitre rapporteur par ordonnance de M. le Premier Président, rendue sur simple requête ;

Ordonne la restitution de l'amende.

(*Revue internationale du Droit maritime*, t. XI., p. 154.)

has as its direct and immediate cause the carelessness, the negligence, or the lack of vigilance of the special workmen entrusted by the company or by the engineers at the head of its technical establishment at Marseilles, with making certain technical repairs to that ship;

That,—admitting that it may be simultaneously attributed to both the lack of superintendence and to negligence on the part of the master, the Compagnie Transatlantique would not be the less personally responsible, first, as having personally, itself or through its representatives, directly participated, and again, *as being responsible for the defaults committed by its master at the home port of the ship*, and acting under its direction and control, and not being allowed therefore, to invoke the exorbitant exoneration clause, by common law, inserted in article 8 of the Bill of Lading;

That,—under these conditions, there are grounds for admitting the right to appeal, and ordering that, the Court not finding in the case the elements for estimating the damages for which satisfaction is demanded, the valuation of same be made by proof before referee, according to law.

FOR THESE REASONS;—

Amending, reforming and doing that which the first judges should have done;

Declare;—The Compagnie Transatlantique responsible for the damage suffered by the goods of appellants, laden upon the Ship *Versailles*, belonging to the said Company;

Sends back the case and the parties before Gautron, 13 rue Tronchet, whom the Court appoints to examine the accounts, documents and records, if the parties cannot come to an agreement according to the terms of article 429 Commercial Code, for the purpose of showing and fixing the amount of damage suffered by the appellants in the accident to the Ship *Versailles* during the night of the 14th to 15th March, 1892, that upon the report of the referee deposited in the office of the Clerk of the Court, same may be closed and decreed as may be proper;

Says that, in case of anything preventing, the referee shall be replaced by an order of the First President, given upon simple request;

Orders the restitution of the sum deposited.

COUR DE CASSATION.—CHAMBRE DES REQUETES.

(3 mars 1897.)

Connaissement. Clause limitant la responsabilité. Avaries de route. Application. Fait personnel de l'armateur. Inapplication. Art. 1382 C. civ.

NAVIRE : *Versailles.*

Les clauses d'un connaissement limitant en cas d'avaries le montant de l'indemnité à payer pour les marchandises, n'ont de valeur que pour les avaries de route, dont l'armateur peut s'exonérer en totalité ou en partie.

Mais elle ne peuvent être opposées pour des avaries provenant du fait personnel de l'armateur ; en pareil cas, aux termes de l'article 1382 du Code civil, il est obligé de réparer le dommage dans son intégralité.

Cie GÉNÉRALE TRANSATLANTIQUE *c.* DEVOTO.

ARRÊT

MOYEN UNIQUE.—Violation et fausse application des articles 1134 et 1152 du Code civil, fausse application de l'article 1382 du même code ; violation des articles 103 et suivants du Code de commerce, des articles 283, 286 et 397 même code, et 7 de la loi du 20 avril 1810 ; en ce que ledit arrêt a formellement violé les termes clairs et précis d'un connaissement d'après lesquels l'indemnité due par la Compagnie Transatlantique pour perte et avaries de marchandises dont elle était responsable, devait être calculée d'après la valeur de ces marchandises *au port de charge*.

"LA COUR,

Sur le moyen unique,

Attendu qu'à la suite de l'échouement du steamer *Versailles* dans le port de Marseille, par une circonstance dont la Compagnie Transatlantique a été déclarée personnellement responsable, les réclamateurs de cafés et de sucres atteints par l'eau de mer ont demandé à titre de dommages-intérêts la différence entre le net produit de leurs marchandises en vente publique et

COURT OF CASSATION—CHAMBER OF REQUESTS.

Bills of Lading.—Clause limiting responsibility.—Damage on the voyage.—How applied.—Personal act of the shipowner.—Not applicable.—Art. 1382 Civil Code.

Ship: VERSAILLES.

The clauses of a bill of lading, which limit the amount of indemnity to be paid for the merchandise in case of damage, are unavailable except in the case of damage in transit for which the shipowner can exonerate himself in whole or in part.

But they cannot be raised in the case of damage resulting from the personal act of the shipowner; in such a case, in conformity with the terms of Article 1382 of the Civil Code, he is obliged to make good the whole damage.

The Company Transatlantique *v.* Devoto.

DECISION.

Only ground: Violation of and improper application of Articles 1134 and 1152 of the Civil Code, improper application of Article 1382 of the same Code; violation of Articles 103 *et seq.* of the Code of Commerce, of Articles 283, 286 and 287 of the same Code, and Article 7 of the law of April 20, 1810; inasmuch as the said decision has formally violated the clear and precise terms of a bill of lading, according to which the indemnity due from the Compagnie Transatlantique for loss and damage to merchandise, for which it was responsible, ought to have been calculated according to the value of the merchandise "at the loading port."

The Court

On the only ground:

Whereas, in consequence of the stranding of the steamer *Versailles*, in the port of Marseilles, in consequence of a cause for which the Compagnie Transatlantique has been declared personally liable, the claimants of the coffee and the sugar damaged by sea water, have claimed as their damage, the difference between the net proceeds of their merchandise at public sale and the price which they would have received, if they had been able to sell them on arrival in a sound condition; the company having opposed article 19 of the bill of lading,

le prix qu'ils en auraient retiré s'ils avaient pu les vendre à l'arrivée en état sain ; que la Compagnie a opposé l'article 19 du connaissement aux termes duquel "en cas de perte ou d'avarie elle ne peut être tenue de rembourser que la valeur intrinsèque de la marchandise calculée au port de charge ;"

Attendu qu'en décidant que cette clause visait seulement les avaries de route dont l'armateur pouvait se décharger en tout ou en partie, et non les avaries provenant du fait personnel de la Compagnie, obligée par l'article 1382 à réparer l'intégralité du dommage, la Cour de Paris, par arrêt du 3 mars 1896, n'a fait que préciser l'intention commune des parties et a interprété, sans la dénaturer, la convention, objet du débat ;

Rejette."

Du 3 mars 1897.—Présid.: M. Tanon ; MM. Letellier, rapp.; Duval, av. gén.; Me Dambeza, av.

(*Revue internationale du Droit maritime*, vol. XII., p. 660.)

according to the terms of which, "in case of loss or damage, it cannot be held liable to pay more than the intrinsic value of the merchandise, computed at the port of loading."

Whereas, in deciding that this clause applied solely to damages in transit, for which the shipowner could have exempted himself in whole or in part, and not to damages resulting from the personal acts of the company, which it was obliged by Article 1382 to make good in full; the Court of Paris, by its decision of March 3, 1896, has done no more than to express more precisely the mutual intention of the parties, and has interpreted, without misconstruing the contract, the object of the controversy,

Rejected.

March 3, 1897.—Pres. M. Tanon; MM. Letellier, Rapp.; Duval, Advocate General; Mr. Dambeza, Atty.

TRIBUNAL DE COMMERCE DU HAVRE.

(18 juin 1894.)

SOCIÉTÉ COMMERCIALE D'AFFRÈTEMENTS CONTRE HUNTER

JUGEMENT

Attendu que la Société commerciale d'affrètements et de commission a fait assigner le capitaine Hunter pour s'entendre condamner à réparer le préjudice qui lui a été causé par la soustraction d'une portion de cargaison faite en cours de voyage par l'équipage du steamer *Mabel ;*

Vu le rapport :

Attendu qu'il résulte tant du constat d'huissier du 28 février dernier que du rapport d'expert et des circonstances de la cause, que le fait même de la soustraction est suffisamment établi et ne peut être sérieusement contesté par le capitaine ; que la quantité de charbon soustraite a été également fixée par l'expert à un chiffre total de 11.171 kilogrammes qui doivent être retenus au débat comme établissant la quantité du déficit ; que dans ces conditions, il ne reste plus qu'à examiner : 1° si le capitaine est responsable des agissements de l'équipage et si l'armateur, contre lequel le demandeur conclut également, a commis une faute pouvant engager sa responsabilité ; 2° si les chiffres indiqués par le demandeur comme représentant le montant du préjudice causé peuvent être admis ;

Sur le premier point :

Attendu, d'une part, que, sans vouloir prétendre que le capitaine Hunter a eu connaissance de la soustraction faite par l'équipage, il convient de décider qu'il est responsable, non seulement du fait de ses préposés en vertu de l'article 1384, mais encore de sa propre négligence en vertu de l'article 1383 du Code civil ; qu'il n'existe aucun doute à cet égard ; que, d'autre part, l'armateur, que les clauses du connaissement mettent, il est vrai, à l'abri d'une condamnation pour négligence, faute ou erreur de jugement des pilote, capitaine, matelots ou autres serviteurs du navire, ne peut voir sa responsabilité engagée que par une faute personnelle ; que cette faute se trouve suffisament indiquée dans l'aménagement intérieur

TRIBUNAL OF COMMERCE OF HAVRE.

June 18th, 1894.

COMMERCIAL CHARTERING SOCIETY *v.* HUNTER.

DECREE

Whereas, the Commercial Chartering and Commission Society has had Captain Hunter summoned in order that he may be condemned to make good the damage which has been caused to it by the substraction of a part of the cargo during the voyage of the steamer *Mabel*, by her crew ;

Having examined the report :

Whereas it appears from both the examination of the court officer, of February 28th last, and from the expert's report and the circumstances of the case, that the fact itself of the substraction is sufficiently established, and cannot be seriously contested by the captain ; that, the quantity of coal substracted has also been fixed by the expert at a total of 11.171 kilogrammes, which should be considered in the discussion as settling the quantity of the deficit ; that, under these circumstances there remains to examine only—

1st. Whether the master is responsible for the doings of the crew, and whether the owner, against whom the plaintiff brings action as well, has committed a default involving his responsibility.

2d. Whether the figures presented by plaintiff as representing the amount of damage should be accepted.

On the first point :

Whereas,on the one hand, that without wishing to pretend that captain Hunter had knowledge of the substraction done by the crew, it is proper to decide that he is responsible, not only for the doings of those under him, as per Article 1384, but further for his own negligence as per Article 1383 of the Civil Code ; that, there is no doubt as to this : that, on the other hand, the owner, whom the clauses of the bill of lading, it is true, shelter from a condemnation for negligence, default or error in judgment of the pilot, master, seamen or other employees of the ship, can only be held responsible for a per-

du steamer dont la défectuosité incombe certainement à l'armement ; qu'il a été constaté, en effet, qu'à un mètre du foyer de la machine existait une vanne en fer ne possédant aucun mode de fermeture qui puisse empêcher de l'ouvrir ; que cette disposition permettait donc à l'équipage de faire des soustractions dans la cargaison, même à l'insu du capitaine, ce qui aurait pu être facilement évité en pratiquant à cette vanne un mode de fermeture quelconque ; que vainement l'armateur alléguerait encore que cette disposition est celle conforme aux usages et à la pratique maritimes ; qu'elle est utile dans certains cas, notamment dans les longs voyages, pour lesquels les soutes à charbon n'étant pas assez grandes, on est obligé de mettre une partie du charbon destiné au navire dans la cale à l'endroit même où cette vanne est pratiquée ; qu'enfin un simple cadenas ne présenterait qu'une faible résistance et ne serait, par suite, pas une fermeture efficace, qu'en admettant même que l'existence de cette vanne soit nécessaire pour les cas indiqués, il ne s'ensuit pas qu'elle ne doive pas avoir un mode de fermeture possible et pratique ; qu'il existe des modes de fermeture autres qu'un simple cadenas et qui suffiraient pour rendre l'ouverture de la vanne impossible ; que l'armateur, en conservant à son steamer un aménagement aussi défectueux, *a donc commis une faute personnelle qui ne lui permet pas d'invoquer à son profit les clauses du connaissement et de la charte-partie ;*

Par ces motifs,

Le Tribunal, etc.

Du 18 juin 1894.—Prés.: M. Alfred Lecocq ; plaid.: Me Guerrand et Begouen.

Revue internationale du Droit maritime (t, X., p. 248.)

sonal default ; that, this default is sufficiently shown in the interior installation of the ship, the defective condition of which certainly is to be charged against the owners ; that, it has been proven, for that matter, that at the distance of a meter from the furnace of the engine there was an iron sluice, without anything to close it which would prevent it from being opened ; that, this arrangement allowed the crew to subtract cargo, even without the knowledge of the master, which could have been easily avoided by attaching to this sluice some sort of lock ; that, the owner would vainly allege that the present arrangement is in accordance with maritime usage and practice ; that it is useful in certain cases, notably on long voyages, for which the bunkers are not big enough, when it is necessary to put a part of the ship's coal in the hold, at the place where this sluice is made ; that, finally, a simple padlock would only offer a feeble resistance and would not besides be an efficient lock—that, admitting even that the existence of this sluice be necessary in the cases shown, it does not follow that it ought not to have some possible and practical manner of locking it ; that there exist other ways of locking besides a simple padlock, and which would suffice to render the opening of the sluice impossible ; that, the owner in keeping such a defective arrangement on his steamer has committed a personal default which does not allow him to invoke to his profit the clauses of the bill of lading and charter party ;

For these reasons :

The Tribunal, etc., of the 18th June, 1894—President, Mr. Alfred Lecocq ; Pleaders, Messrs. Guerrand and Begoüen.

Capitaine.—Armateur.—État défectueux du Navire.—Faute d'arrimage.—Responsabilité.—Clause de non responsabilité.

Le capitaine est responsable des avaries aux marchandises, à moins qu'il prouve qu'elles sont dues à des fortunes de mer.

La rupture de la soute à lest d'eau n'est pas présumée provenir des fortunes de mer ; une expertise pourrait établir qu'il en est ainsi ; mais un certificat d'inspection donné antérieurement par les experts du Lloyd n'est pas une preuve suffisante.

Lorsque le connaissement libère les armateurs "des fautes et négligences du capitaine, du pilote et des marins," les fautes d'arrimage ne sont pas comprises dans cette exemption.

Les armateurs ne peuvent s'exonérer des avaries provenant de l'état défectueux du navire, de son défaut de réparations et d'entretien.

(Rondeau, Nos et Stetten et Selb et Huverstuhl contre Capitaine Bergwitz.)

JUGEMENT.

Vu l'exploit de citation du 13 novembre 1886, enregistré, tendant au paiement de fr. 10,000 de dommages-intérêts pour avaries à une partie bois de chêne ;

Vu le procès-verbal des experts De Paepe, Falk et Demblon ; nommés pour rechercher les causes des avaries, procès-verbal déposé par acte enregistré du 14 décembre 1886 ;

Vu le rapport d'arrimage fait par les experts Uyttenhoven, Govaerts et Férauge, rapport déposé par acte enregistré du 30 novembre 1886 ;

Vu le rapport de mer du capitaine Bergwitz, enregistré sur extrait le 8 janvier 1887 ;

Attendu que les experts De Paepe, Falk et Demblon ont constaté que les avaries au chargement bois proviennent de l'eau de mer qui s'est introduite au fond de la cale par la paroi d'une soute à lest qui n'était pas étanche ; de plus le canal des anguilliers était obstrué par du ciment, et les lumières de la cloison de séparation par un amas de grains et de saletés ; ils

(COURT OF CASSATION OF BELGIUM.)

Master.—Shipowner.—Defective condition of the vessel.—Faulty stowage.—Liability.—Non-responsibility clause.

The captain is responsible for damage to the merchandise, provided he does not prove that it was due to the perils of the sea.

The breaking of the water tank is not presumed to be due to the perils of the sea; a judicial survey could possibly establish that this was the case, but a certificate of inspection given previously by the experts of Lloyds, is not sufficient proof.

While the bill of lading frees the shipowners for "the faults and negligence of the captain, pilot and the mariners," faulty stowage is not comprised in this exception.

The shipowners cannot exonerate themselves from damage resulting from the defective condition of the vessel, from its faulty repairs and maintenance.

(Rondeau, Nos et Stetten et Selb et Huverstuhl against Captain Bergwitz.)

DECREE.

Having seen the citation filed November 13, 1886, calling for the payment of 10,000 frs. for damages and interest, for damage to some oak lumber;

Having seen the opinion of the experts De Paepe, Falk and Demblon, appointed to ascertain the cause of the average, which opinion was deposited according to law and registered December 14, 1886;

Having seen the stowage report made by experts Uyttenhoven, Govaerts and Férauge, which report was deposited according to law and registered November 30, 1886;

Having seen Captain Bergwitz's protest, an extract of which was registered January 3, 1887;

Whereas the experts De Paepe, Falk and Demblon have shown that the damage to the cargo of lumber was caused by sea water, which had ingress to the bottom of the hold, from one of the partitions of the ballast tanks, which was not watertight; furthermore the limber channels were obstructed by cement, and the limber hole of the separating bulkhead by a heap of grain and dirt, they did not see traces of an extraordi-

n'ont pas vu de traces d'une fatigue extraordinaire du navire par fortune de mer, et sont d'avis que les avaries sont dues à l'état défectueux de la soute à lest et du vaigrage des fonds de cale ;

Attendu que par exploit enregistré du 12 novembre 1885, il a été protesté contre le capitaine Bergwitz, à la requête de Rondeau, Nos et Stetten ; que si la réception a été faite par Selb et Huverstuhl, qui n'ont pas protesté en leur nom, la réclamation n'en reste pas moins recevable, Rondeau et Cie étant les mandants de Selb et Huverstuhl, ce que le capitaine savait ;

Attendu que le défendeur soutient à tort que le rapport d'arrimage attribue à des fortunes de mer l'avarie aux marchandises ; les experts arrimeurs sont d'accord avec les experts contradictoires pour dire que les planches ont été mouillées par le mauvais état de la soute à lest d'eau, par la disposition défectueuse des vaigres des fonds, et la condamnation du canal des anguilliers ;

Attendu que le défendeur soutient que la rupture de la soute à lest est due à des fortunes de mer et il invoque à cet égard son rapport de mer affirmé par l'équipage ; mais cette appréciation contredite par les experts comme il est dit ci-dessus, n'est corroborée par rien ; le rapport de mer lui-même se borne à affirmer que le navire a subi des tempêtes, qu'il a pris une bande etc., mais ne parle de la soute à lest que pour dire qu'elle s'était vidée de 8 pouces en 10 heures, et que la bande du navire augmentait quand on vidait la soute ;

Dans ces conditions, il incomberait au défendeur de démontrer par une expertise que la rupture de la soute était due aux fatigues et aux évènements du voyage, ce qu'il n'a pas fait ; sous ce rapport, l'inspection faite le 28 novembre 1885 par les experts du Lloyd ne peut prévaloir contre le fait ; il est constant que la soute n'est plus étanche, l'armement doit justifier ce mauvais état du navire ;

Attendu que le capitaine défendeur doit donc être déclaré responsable des avaries ;

Attendu que le défendeur, prenant personnellement pour lui toute la responsabilité, soutient qu'il ne peut être tenu comme le mandataire des armateurs, parce que les conditions du transport libèrent l'armateur de toutes les conséquences des fautes et négligences du capitaine ;

nary labor of the vessel by a peril of the sea, and they are of opinion that the damages are due to the defective condition of the ballast tank and of the floor ceiling of the hold;

Whereas by the objection filed November 12, 1886, a protest was entered against Captain Bergwitz at the request of Rondeau, Nos and Stetten; that if Selb and Huverstuhl received the goods, who did not protest in their own name, the claim is none the less acceptable, Rondeau & Co. being the constituents of Selb and Huverstuhl, which fact the captain knew;

Whereas the defendant maintains wrongfully, that the report of the stowage attributes the damage to the goods to perils of the sea, the expert stevedores are agreed with the opposing experts in saying that the lumber was wetted by the poor condition of the ballast tank, by the defective disposition of the planks of the ceiling, and the condemnation of the channel of the limbers;

Whereas the defendant maintains that the breaking of the ballast tank is due to perils of the sea and he refers for this purpose to his marine protest, affirmed by the crew; but this protest is contradicted by the experts as is hereinabove stated, and is uncorroborated; the marine protest itself is limited to affirming that the vessel encountered storms, that it took a list, &c., but merely speaks of the ballast tanks, that they ran out 8 inches in 10 hours, and that the list of the vessel increased when the tank was emptied.

In these conditions it devolved upon the defendant to show by an expert examination that the break of the tank was due to straining and to the events of the voyage; which he has not done; by the report, the inspection made November 28, 1885, by the experts of the Lloyds cannot prevail against the facts; it is certain that the tank is no longer water tight and the owners must justify the bad condition of the ship;

Whereas the defendant master must be declared responsible for the damages;

Whereas the defendant, taking personally for himself all the responsibility, maintains that he cannot be held as representative of the shipowner, because the conditions of the transport absolved the shipowner from all the consequences of the fault and negligence of the master;

Whereas faults of stowage are not expressly exempted, and we cannot presume that the expression "the faults and negli-

Attendu que les fautes d'arrimage ne sont pas expressément exemptées, et qu'on ne peut présumer que l'expression : *les fautes et négligences du capitaine, du pilote et des marins*, comprenne les fautes dans l'arrimage, celui-ci n'étant généralement pas le fait exclusif du capitaine, mais également des agents spéciaux des armateurs, et même parfois le fait exclusif de ces derniers ; que si l'on avait voulu décharger les armateurs des fautes de leurs agents spéciaux, ils auraient eu soin de mentionner expressément les fautes de *stowage* ;

Mais, attendu que si les circonstances relevées dans la présente cause impliquent des fautes d'arrimage, elles accusent en même temps l'état défectueux du navire, son défaut de réparations et d'entretien, ce dont les armateurs ne se sont pas déchargés et ne peuvent pas s'exonérer ;

Qu'à tous les points de vue donc, la condamnation qui doit intervenir contre le capitaine Bergwitz, doit l'atteindre en sa qualité de représentant de l'armement du steamer *Knight Templar ;* et que pour les motifs developpés ci-dessus il ne peut pas être davantage question de ranger en avaries communes le dommage réclamé par les demandeurs :

Quant au montant du dommage :

Attendu que l'avarie a été évaluée de commun accord à fr. 4,000, indépendamment des frais d'allège, d'expertise, de caution, etc. ; que les frais doivent suivre le sort du principal, et incomber au capitaine au même titre ; qu'ils s'élèvent suivant justification à fr. 434 plus fr. 235.80 pour frais d'expertise, sous réserve des frais de saisie ;

Par ces motifs,

Le Tribunal, rejetant toutes fins contraires, condamne le défendeur Bergwitz, tant en son nom personnel que comme représentant de l'armement, à payer aux demandeurs fr. 4,669.80 avec les intérêts judiciaires et les dépens ; déclare le présent jugement exécutoire nonobstant appel mais moyennant caution, les demandeurs Rondeau, Nos et Stetten étant étrangers.

Du 20 avril 1887.—1re Ch.—Mm. Lambrechts, Van de Vin et Fassbender, juges.—Pl. Mes. Maeterlinck et Sheridan.

Jurisprudence du Port d'Anvers 1887 (p. 142).

gence of the captain, of the pilot and of the mariners," include the faults in stowage, these not being ordinarily the exclusive affair of the captain, but equally of the special agents of the shipowners, and even at times, the exclusive affair of the latter; that if it had been the intent to discharge the shipowners from liability for faults of their special agents they would have taken care to mention specially faults in stowage;

But whereas the circumstances brought out in the present cause imply faults in stowage, they at the same time point to the defective conditions of the vessel, its want of repairs and proper maintenance; concerning which the shipowners have not discharged themselves, and cannot exonerate themselves;

That, therefore, from the various points of view, the condemnation which must ensue against Captain Bergwitz must be in his capacity as representative of the owners of the steamer *Knight Templar;* and on the grounds above stated no claim can be made to distribute in general average the damages recoverable by the plaintiffs.

As to the amount of damage:

Whereas the damage has been fixed by consent at 4,000 francs, independently of the expenses of lighterage, of having expert investigations, of giving security, &c., that the expenses must follow the fate of the principal, and fall on the captain under the same head; that they amount according to the voucher to 434 francs, with 235.85 francs expenses for the expert investigation, saving the expenses of seizure.

For these reasons:

The Tribunal, overruling all contrary pleas, condemns the defendant Bergwitz, as well personally as also as representative of the owners, to pay to the claimants 4,669 francs, together with legal interest and costs; declares the present judgment collectible notwithstanding an appeal, but by means of security, because the plaintiffs Rondeau, Nos and Stetten are foreigners.

April 20, 1887, 1st Chamber, Messrs. LAMBRECHTS, VAN DE VIN and FASSBENDER, Judges. Counsel, Messrs. MAETERLINCK and SHERIDAN.

1°. Capitaine.—Avarie à la cargaison.—Voie d'eau.—Pompes.—Navire dans le port.—2°. Connaissement.—Clause de non responsabilité.—Étendu.—Doute.

1°. *Dans le cas où, par suite d'une fortune de mer, l'eau a pénétré dans le tunnel de l'hélice, puis dans le collecteur, et que les pompes ont empêché que le niveau de l'eau ne s'élevât de manière à causer du dommage dans les cales, le devoir du capitaine est de veiller, après l'arrêt des pompes, c'est-à-dire quand le navire est dans le port, à ce que l'eau ne s'infiltre dans les cales.*

2°. *La clause du connaissement aux termes de laquelle les armateurs ne sont pas responsables des pertes et du dommage, résultant de collision, échouement, jet ou autres fortunes de mer, rivière ou navigation de quelque nature qu'elle soit, même lorsqu'elle aura été causée par négligence, défaut ou erreur de jugement des pilote, capitaine, matelots ou autres serviteurs du navire, prévoit les accidents qui auraient été provoqués ou aggravés par des fautes dans la conduite du navire, pendant qu'il était soumis aux risques propres de la navigation ; mais elle ne peut être étendue à un défaut de soins dans la conservation de la marchandise après que le navire était amarré dans le port.*

En cas de doute sur la portée d'une clause dérogatoire au droit commun et dont l'application doit être entendue restrictivement, c'est contre celui qui l'a stipulée à son profit que le doute doit s'interpréter.

(Greenock Steamship Co. contre Wolkaemmerei.)

ARRÊT.

Attendu que s'il est établi, par les constatations des experts, que l'introduction de l'eau dans le tunnel de l'hélice du steamer *Bothwell Castle* et, de ce tunnel, dans le collecteur, a été le résultat d'une fortune de mer, il en ressort cependant aussi la preuve qu'aussi longtemps que, par la marche des machines actionnant le propulseur, les pompes étaient mise en mouvement, l'épuisement du collecteur ou toptank ne laissait pas à

(COURT OF CASSATION OF BELGIUM.)

1°. Captain—Damage to Cargo—Leak—Pumps—Vessel in Port.

2°. Bill of Lading — Non-liability Clause — Construction—Doubt.

1°. Where through a sea peril, water penetrates into the shaft tunnel, thence into the well, but the pumps have kept down the water, so as not to do damage in the hold, it is the duty of the master, after the pumps are stopped (that is to say, when the vessel is in port) to see that the water does not infiltrate into the hold.

2°. The clause in the bill of lading, according to the terms of which, the owners are not liable for loss or damage, resulting from collision, stranding, jettison or other perils of the sea, rivers or navigation of whatever nature they may be, even when caused by negligence, fault or error in judgment of the pilot, captain, mariners, or other persons in the service of the vessel contemplates accidents that may be induced or aggravated by faults in the conduct of the vessel, while it was exposed to the risks incident to the navigation ; but it cannot be extended to include a want of care in the preservation of the goods, after the vessel has been moored in port.

In case of doubt, as to the import of a clause in derogation of the common law, and which when used must be construed strictly, the doubt should be interpreted against him who has inserted the clause for his own benefit.

GREENOCK STEAMSHIP CO. AGAINST WOLKAEMMEREI.

DECREE.

Whereas it is established by the opinions of the experts that the introduction of water into the shaft tunnel of the steamer *Bothwell Castle*, and from this tunnel, into the well, was the result of a peril of the sea, it also appears nevertheless, that as long as the movement of the machinery which propelled the screw, kept the pumps going, the emptying of the well or top tank, left nothing to be desired, and that the water line did not rise sufficiently to do damage in the holds ;

That the introduction of water into compartment 3 of the

désirer, et que le niveau de l'eau ne s'élevait pas de manière à causer du dommage dans les cales ;

Que l'introduction des eaux dans le compartiment No. 3 de celle-ci, où étaient déposées les balles de laine, n'a pu avoir lieu qu'après l'arrêt des pompes, c'est-à-dire quand le navire était dans le port ;

Attendu qu'à ce moment, le capitaine avait le devoir de veiller à ce que le trop plein du collecteur ne s'infiltrât pas dans les cales ;

Qu'il semble y avoir songé puisque, d'après ce qui a été rapporté aux experts dans leur visite du navire, il aurait fait boucher, par des tampons de bois, les trous des anguillers, précaution qui fut d'ailleurs insuffisante pour rendre les cales étanches ;

Attendu que, d'après les qualités du jugement *a quo*, les appelants se sont fait un moyen de défense de ce que les pompes, étant dépendantes des machines propulsives, devraient cesser de fonctionner en même temps que celles-ci ;

Attendu que c'était là reconnaître qu'après l'arrêt du navire, on avait cessé d'épuiser les eaux ;

Qu'à la vérité, ils offrent aujourd'hui de prouver qu'ils ont mis les pompes en mouvement à l'aide de la petite machine ou Donkey, mais que cette allégation tardive est controuvée par leur aveu, comme aussi par tous les éléments de fait acquis à la cause ;

Quant à la clause de la convention verbale d'affrètement d'après laquelle les appelants soutiennent être exonérés de la responsabilité des avaries dans le cas de l'espèce ;

Attendu que cette clause, dont les termes sont reconnus, excepte de la règle commune les pertes ou dommages résultant de collision, échouement, jet et autres fortunes de mer, rivière ou navigation, de quelque nature ou sorte qu'elle puisse être, même lorsqu'elle aura été causée par négligence, défaut ou erreur de jugement du pilote, capitaine, matelots et autres serviteurs des armateurs ;

Attendu qu'il s'agit là d'accidents qui auraient été provoqués ou aggravés par des fautes dans la conduite du navire, pendant qu'il était soumis aux risques propres de la navigation ;

Qu'on ne peut étendre cette exception à un défaut de soins dans la conservation des marchandises après que le navire est amarré dans le port ;

hold, where the bales of wool were stored, could not have taken place, until after the stoppage of the pumps, that is to say, when the vessel was in port;

Whereas at that moment, it was the duty of the captain to watch, that the overflowing water from the well did not run into the holds;

That it seems that he thought of this since, from what he reported to the experts on their visit to the vessel, it appears that he had the limber holds stopped up, by wooden bungs, a precaution which was, however, insufficient to render the holds water tight;

Whereas from the findings of the judgment below the appellants have put forward a ground of defense in that the pumps being dependent on the motion of the propelling machinery, were obliged to stop, at the same time when it stopped; whereas it was evident that after the stopping of the vessel, they ceased to take out the water. As to the truth, they offer today to prove, that they put the pumps in motion, with the aid of a small or donkey engine, but this allegation is an afterthought offset by their admission, as also by all the elements of facts found in the cause.

As to the clause of the verbal agreement of affreightment, according to which appellants claim to be exonerated from liability for damage in a case of this kind;

Whereas this clause, the terms of which are admitted, excepts from the common rule, losses or damages resulting from collision, stranding, jettison and other peril of the seas, rivers or navigation, of whatever nature or kind they may be, even when they may have been caused by negligence, fault or error in judgment of the pilot, captain, mariners and other servants of the shipowner;

Whereas, if this covers accidents which may have been induced or aggravated by error in the conduct of the vessel while it was exposed to the risks incident to navigation;

That this exemption cannot be interpreted to include want of care in the preservation of goods, after the vessel is moored in port;

Moreover, if a doubt could exist as to the import of a clause in derogation of common law, and which must be construed strictly, then such a doubt must be interpreted against him who has inserted the clause for his own benefit;

Qu'au surplus, si un doute pouvait subsister sur la portée d'une clause dérogatoire au droit commun et dont l'application doit être entendue restrictivement, c'est contre celui qui l'a stipulée à son profit que ce doute devrait s'interpréter ;

Par ces motifs et ceux du premier juge,

La Cour, rejetant la preuve offerte par les appelants, déclare ceux-ci sans griefs : les déboute en conséquence de leur appel et les condamne aux dépens.

Du 24 octobre 1890.—5me Ch.—M. Terlinden, prés.—Pl. Mes. Hayvaert et Van Meenen.

Jurisprudence du Port d'Anvers 1891 (pp. 31-34).

For these reasons, and for those of the first judge, the Court, rejecting the proof offered by the appellants, declares that they are not aggrieved, and in consequence rejects their appeal, and condemns them for costs.

Oct. 24th 1890, 5th Ch., M. FERLINDEN, pres. Advocates, Messrs. HEYVAERT and VAN MEENEN.

Connaissement. — Clause d'irresponsabilité. — Avaries.— Echauffement des grains.— Mauvaise construction des soutes.

*Sous l'empire de la clause "**les armateurs sont exonérés des** conséquences de la chaleur, même si elles **sont** occasionnées par la faute et la négligence du capitaine," les armateurs ne peuvent invoquer leur irresponsabilité, lorsque l'avarie provient de deux causes combinées ; la construction défectueuse du steamer pour transporter des grains dans ses soutes, et la faute du capitaine de les y avoir logés.*

Les armateurs ont commis une faute et une négligence personnelle en ne défendant pas au capitaine de loger des grains dans ces compartiments.

(Jos. Claessens contre Capitaine Townsend.)

JUGEMENT.

Vu les rétroactes de la cause ;

Vu l'exploit d'avenir enregistré du 19 janvier 1889, tendant au payement de fr. 3,648.22 de dommage-intérêts, plus fr. 478.58 pour frais ;

Attendu que l'avarie aux orges du demandeur est due à l'échauffement provenu de leur arrimage dans les soutes voisines de la chambre des machines, soutes dont les parois laissaient pénétrer la chaleur, parcequ'elles n'étaient pas revêtues de cloisons en bois ;

Attendu que le défendeur se reconnait personnellement responsable des avaries, mais soutient que les armateurs du steamer ne sont pas tenus ;

Attendu qu'aux termes de la convention de transport, les armateurs sont exonérés des conséquences de la chaleur, même si elles sont occasionnées par la faute et la négligence du capitaine ;

Mais, attendu que l'avarie dont question au présent procès provient de deux causes combinées : la construction défectueuse du steamer pour transporter des grains dans ses soutes, et la faute du capitaine de les y avoir logés ;

Les armateurs ont su que les grains seraient logés dans ces

(COURT OF CASSATION OF BELGIUM.)

Bill of Lading.—Clause of Irresponsibility.—Damages.—Heating of Grain.—Bad Construction of the Tanks.

Under authority of the clause "shipowners are exonerated from the consequences of heat, even if it is occasioned by the fault and the negligence of the captain," the shipowners are not permitted to invoke their exemption when the damage results from two causes combined; the defective construction of the steamer for transporting the grain in its tanks, and the fault of the captain in having stowed it there.

The shipowners have committed a fault and a personal negligence in not prohibiting the captain from stowing the grain in these compartments.

(Jos. Claessens against Captain Townsend.)

DECREE.

Having seen the preceding documents in the cause;

Having seen the executory judgment filed January 19, 1889, directing the payment of 3,648.22 francs for damages and interest plus 478.58 francs for expenses;

Whereas, the damage to the plaintiff's barley is due to heating, caused by its stowage in the tanks adjoining the engine-room; tanks, the sides of which allowed the heat to pass through, because they were not covered with a wooden partition;

Whereas the defendant acknowledged himself personally liable for damages, but insists that the owners of the steamer are not liable;

Whereas, according to the terms of contract of carriage, the owners are exonerated from the consequences of heat, even if it is occasioned by the fault and the negligence of the captain;

But whereas the damage in question in the present case results from two combined causes, the defective construction of the steamer for carrying grain in its tanks, and the fault of the captain in having stowed it there;

The owners knew that grain was to be stowed in these tanks; at least it is incumbent on them to prove the contrary, and to establish that it was unknown to them that the charter-party was made which authorized the stowage of grain in that place; but they do not offer any proof, and do not even set

soutes ; au moins devraient-ils prouver le contraire, et établir que c'est à leur insu qu'a été faite la charte-partie qui autorisait l'arrimage du grain dans cet endroit ; or ils n'en offrent pas la preuve, et n'invoquent même pas pareille ignorance ; ils ont donc su que des grains seraient logés dans les soutes ; *dès lors ils ont commis une faute et une négligence personnelle, en ne défendant pas au capitaine de loger des grains dans ces compartiments ; ou encore la construction de cette partie du steamer est défectueuse pour pareille destination ;*

Attendu que le capitaine doit donc être déclaré responsable, tant comme représentant l'armement qu'en nom personnel ;

Quant au montant des sommes réclamées :

Attendu que le défendeur, après avoir réclamé des justifications quant aux fr. 478.58 de frais, a reçu ces justifications, et n'a plus fait d'objections ;

Par ces motifs,

Le Tribunal, rejetant toutes fins contraires, condamne le défendeur Townsend tant en nom personnel que comme représentant les armateurs du steamer *Harter* à payer au demandeur fr. 4,126.80 avec les intérêts judiciaires et les dépens, y compris les honoraires de l'expert Van Peborgh ; déclare le présent jugement exécutoire nonobstant appel et sans caution.

Du 27 avril 1889.—1re Ch.—Mm. Van Geetruyen, de Wael et Hertogs, juges.—Pl. Mes. Van Olffen et Vrancken.

Jurisprudence du Port d'Anvers 1889 (pp. 240-242).

up such ignorance; they therefore knew that grain would be placed in the tanks; *from this, therefore, they have committed a fault and a personal act of negligence in not prohibiting the captain from placing grain in these compartments, where, moreover, the construction of this part of the steamer is defective for such purpose;*

Whereas the captain must therefore be declared responsible, both personally and as the representative of the owners;

As to the amount of the sum claimed:

Whereas the defendant, after having set up a claim to 478.58 francs for expenses; and having received same, and having made no further objections;

For these reasons:

The Court, rejecting all contrary pleas, condemns the defendant Townsend, as well personally as also as representative of the owners of the steamer *Harter*, to pay to the libellant 4,126.80 francs, with legal interest and costs, including in the latter the fees of expert Van Peborg; declares the present judgment executory notwithstanding an appeal and without security.

April 27, 1889. First Chamber.—Messrs. VAN GREETRUEN, DE WAEL and HERTOGS, Judges.—Counsel, Messrs. OLFFEN and VRANCKEN.

GERMAN AUTHORITIES.

In the deliberations of the commission which prepared the Commercial Code of Germany, it was proposed to declare the carrier by sea liable only for diligence in his efforts to have the ship seaworthy. This was decisively rejected by the vote of 8 to 1. The reasons for refusing this proposed change were thus stated:

"Es sei nicht richtig, dass der Verfrachter nach der Auffassung des Verkehrs rücksichtlich der Lieferung des Schiffs in seetüchtigem Zustand blos für Diligenz zu haften habe. Er habe vielmehr, soweit dies im Bereiche der Möglichkeit liege, *rem ad usum habilem* zu prästiren, und deshalb nicht blos für seine eigenen Versehen oder für *culpa in eligendo*, wie dies bei Annahme des Antrags unter *a* der Fall sein würde, sondern auch für die Versehen der zur Herstellung und Reparatur des Schiffs verwendeten Schiffszimmerleute u. dgl. einzustehen; er hafte nicht blos für Diligenz, sondern für die Seetüchtigkeit selbst."

Protokolle der Kommission zur Berathung eines allgemeinen deutschen Handelsgesetzbuches. Vol. 8, p. 3848, Würzburg, 1863.

"Der Verfrachter hat dafür einzustehen, dass das von ihm gelieferte Schiff sich im seetüchtigem Stande befindet, d. h. nicht blos im Stande ist, überhaupt See zu halten, sondern die den Gegenstand des Frachtvertrags bildende Reise auszuführen. Er hat daher den durch die mangelhafte Beschaffenheit des Schiffs verursachten Schaden dem Befrachter zu ersetzen, und zwar nicht nur den, welcher durch eigenes Versehen in Betreff des Schiffs selbst (z. B. durch unterlassene Untersuchung desselben, Anordnung einer unzulänglichen Reparatur) oder in Betreff der Auswahl der zur Vornahme der Untersuchung und der etwa erforderlichen Reparaturen bestellten Personen (*culpa in eligendo*) sondern auch durch Versehen eben dieser Personen verursacht ist. Er haftet für jedweden Schaden, mag dieser im Verlust oder der Beschädigung von Gütern bestehen, mag er bestehen in der Verzögerung der Abreise, oder in der Unmöglichkeit überhaupt den Transport auszuführen. Doch wird für die Haftbarkeit des Verfrachters vorausgesetzt, dass die Mängel vorhanden waren zur Zeit, als das Schiff dem Befrachter zur Disposition gestellt wurde, und nicht erst nachher entstanden sind, ferner dass es nicht nach seemännischer Anshauung auserhalb der Möglichkeit lag, die Mängel zu entdecken."

Das Seerecht, von Lewis, Reatz, und Schroeder, p. 130, Leipzig, 1884.

It could not be right that the carrier, according to the commercial view, should be liable only for diligence in respect to furnishing the vessel in a seaworthy condition. He has rather, so far as lies within the limits of possibility, to warrant the *res* fit for use ; and therefore has to answer not only for his own faults, or for faults in selection (as would be the case by the adoption of the motion), but also for the faults of the shipwrights and others employed in the restoration and repair of the vessel. *He is answerable not merely for diligence, but for the seaworthiness itself.*

The carrier has to be responsible that the ship delivered by him shall be in a seaworthy state, that is, not merely in a state to go to sea, but to perform the voyage which is the subject of the affreightment contract. He is therefore responsible for damages to the charterer caused by the defective condition of the ship ; and not alone those from his personal defaults in regard to the vessel itself—such, for example, as omission to hold surveys, ordering insufficient repairs, or respecting his choice of people to take charge of surveys, and any repairs required (fault in selection)—but also for the defaults of even these persons.

He is liable for every damage, be it loss or injury to the goods, prolongation of the voyage, or even inability to complete the transport. However the liability of the carrier presupposes that the defects existed at the time the vessel was put at the charterer's disposal, and did not come into existence thereafter, further that, according to seafaring ideas, *it was beyond the bounds of possibility to discover the defects.*"

§ 51. Beschädigung der im Bunkerraum befindlichen Ladung durch das durch denselben hindurchgehende glühende Schornsteinrohr des Donkeykessels.—Liegt hierin ein Mangel in der Seetüchtigkeit des Schiffes?

Capitän H. Penney vom englishen Dampfer "Athena" gegen die Firma "Ehlers & Löwenthal zu Hamburg."

In dieser Hptbl. 1893 No. 95 referirten Sache verwarf das R.-G. am 17. März 1894 die Revision des Klägers.

ENTSCHEIDUNGS-GRNÜDE

Der Berufungsrichter geht davon aus, dass das Feuer im Bunkerraum durch das Rohr des Donkeykessels in Verbindung mit dem Umstande entstanden ist, dass das Rohr dem Trennungsschott zu nahe lag. Diese Feststellung ist nicht angegriffen, auch keinem Bedenken unterworfen.

Der Berufungsrichter macht die Rhederei für den durch das Feuer entstandenen Schaden nach Art. 560 (607) des H. G. B. und auf Grund des Connossements verantwortlich, weil in der Art der Anlage des Donkeykessels und seines Rohrs ein die Ladung im Bunkerraum erkennbar gefährdender und desshalb erkennbar mangelhafter Zustand des Schiffes, gegen den Schutzvorkehrungen hätten getroffen werden müssen, zu finden sei. Ist letzteres richtig, so liegen rechtliche Bedenken gegen die Haftung der Rhederei für den Schaden weder nach Art. 560 (607) des H. G. B. noch nach dem Connossement vor. Auf die weitere Begründung des Berufungsurtheils und die dagegen von der Revision erhobenen Angriffe kommt es dann nicht an. Die Rhederei hat sich zwar von Schaden durch Feuer freigezeichnet, nach dem Connossement gilt diese Freizeichnung aber nur unter der Voraussetzung der Seetüchtigkeit des Schiffes.

"And all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage."

Die Revision zieht dies auch nicht in Zweifel. Sie rügt an erster Stelle, dass der Berufungsrichter den Begriff der Seetüchtigkeit verkannt habe, aber ohne Grund.

Dem Berufungsrichter ist zunächst darin beizutreten, dass für die Entscheidung darauf nichts ankommt, dass die Ladung

§ 51. Damage to the cargo in the bunker space through the heated funnel of the donkey boiler which passed through it. Does this constitute want of seaworthiness of the vessel?

Captain H. Penney, of the English S. S. *Athena* vs. the firm of Ehlers & Loewenthal, of Hamburg.

In the case reported as No. 95 in the volume of 1893 of these Reports, the Imperial Court dismissed the appeal of the plaintiff on March 17th, 1894.

GROUNDS FOR DECISION.

The appellate Judge starts with the view, that the fire in the bunker space arose from the funnel in connection with the circumstance, that the funnel was too near the dividing bulkhead. This finding is not attacked nor in any way questioned.

The appellate Judge holds the ship-owner liable for the damage caused by the fire, under Art. 560 (607) of the German Commercial Code, and the bill of lading, because in the mode of arranging the donkey boiler and its funnel, a condition existed which was recognizable as endangering the cargo in the bunker space, and therefore a condition of the vessel perceptibly defective, against which precautions ought to have been taken.

If the latter is correct, then there are legal questions as to the liability of the ship-owners on account of the damage, either under Art. 560 (607) of the German Commercial Code, or pursuant to the bill of lading. No attention need then be paid to the further points raised by the Appellate judgment, or to the attacks on them by the appellants. It is true that the ship-owners have exempted themselves from liability for damage by fire, but according to the bill of lading, this exemption only holds good on the condition of the seaworthiness of the vessel.

> "And all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage."

The appellants do not question this. They assert, but without cause, that the appellate Judge mistook the meaning of seaworthiness.

First of all, the conclusion of the appellate Judge is to be concurred in, that for the purpose of the decision, it matters

von dem Brande erst bei der Löschung betroffen ist. Die allgemeine Verpflichtung, welche der Art. 560, Abs. 1 dem Verfrachter aus dem Frachtvertrage auferlegt, ist beim Zusammenhalt mit Art. 480 des H. G. B. dahin zu erstrecken, dass er ein Schiff stellt, welches geeignet ist, die Ladung ungefährdet zu transportiren. Ein Schiff, dass eine Anlage enthält, welche die Ladung und mit der Ladung nothwendig auch das Schiff der Feuersgefahr aussetzt, ist kein seetüchtiges Schiff. Das Urtheil des R.-G. in den Entsch. für Civils. Bd. 25, S. 104 steht dem in keiner Weise entgegen. Es giebt keine grössere Seegefahr als Feuersgefahr an Bord. Dass das Feuer auch während der Seereise bei Benutzung des Donkeykessels hätte enstehen können, liegt auf der Hand. Dass es erst während des Löschens der Ladung entstanden, ist hiernach namentlich auch für die Verpflichtung des Verfrachters aus dem *receptum* Art. 607 des H. G. B., gleichgültig. Und aus dem *receptum* wird geklagt. Denn die Beklagte nimmt den Kläger für Schaden in Anspruch, der ihr durch Verlust und Beschädigung des Guts vor der Ablieferung entstanden ist. Gegenüber der im Connossement enthaltenen Freizeichnung von Feuersgefahr hat die Beklagte zu beweisen, dass der Brand nicht auf höherer Gewalt beruht. Diesen Beweis hat sie nach der Feststellung, dass der Brand auf eine feuergefährliche, mangelhafte Anlage im Schiff und damit auf einen mangelhaften Zustand des Schiffes zurückzuführen ist, geführt. Sache des Klägers ist der Nachweis, dass der mangelhafte Zustand des Schiffes, d. h. hier die Feuergefährlichkeit der Anlage, aller Sorgfalt ungeachtet nicht zu entdecken war. Art. 560, Abs. 2; Art. 607, Abs. 2 des H. G. B., Prot. S. 2066 Entsch. des R. O. H. G., Bd. 23, S. 20, 22.

Die Feuergefährlichkeit der Anlage aber stellt der Berufungsrichter thatsächlich fest und darüber kann auch nach dem Gutachten der Sachverständigen Stammel, Sohst und Rohde gar kein Bedenken aufkommen. Die letzteren Beiden bekunden sogar, ihnen sei aus ihrer Praxis bekannt, dass wiederholt durch solche Anlage Feuer entstanden sei. Neben dieser objectiven Gefährlichkeit kommt darauf nicht an, ob und durch welche Vorsichtsmassregeln die Gefährlichkeit hätte beseitigt werden können, sondern nur darauf, ob der Verfrachter die Feuergefährlichkeit, aller Sorgfalt ungeachtet, nicht endecken konnte.

not, that the cargo was not touched by the fire, until it was being discharged. The general obligation which Art. 560, § 1 imposed on the carrier by the freight contract, is to be extended, when taken together with Art. 480 of the German Com. Code, so as to make it obligatory for him to furnish a vessel which is fit to transport the cargo unendangered. A vessel, that contains a plant which exposes the cargo, and with the cargo necessarily also the vessel, to the danger of fire, is not a seaworthy vessel. The decision of the Imperial Court in the reports for civil matters, Vol. 28, p. 104, is not opposed to this in any manner. There is no greater sea-peril than the danger of fire on board. It is apparent, that the fire could also have occurred by using the donkey boiler during the voyage. In view of these facts it is immaterial, that it first started during the discharge of the cargo, in considering the obligations of the carrier, arising out of the receptum of Art. 607 of the German Com. Code. And they are suing on the receptum. The defendants claim damages from the plaintiff, which they sustained by reason of loss and injury to goods before delivery. For the purpose of the exemption from fire contained in the bill of lading, the defendants must prove that the fire was not caused by *vis major*. They have proved this when they established the fact that the fire can be traced to a defective plant on board ship, exposed to the danger of fire, and thereby to a defect of the ship. It is for the plaintiff to show that the defective condition of the vessel, viz.: here the risk of fire from the plant, could not have been detected. Art. 560, § 2, Art. 607, § 2, of the German Com. Code.

The appellate Judge finds the plant was fire hazardous, and no doubt as to the fact can arise, on reading the opinions of the experts Stammel, Sohst and Rohde. The latter two even stated, that they know from their experience, that fire was repeatedly caused by such plants. In view of the objective danger it matters not, whether and by what precautions, the danger could have been removed, but only, whether the carrier could not have discovered the danger of fire with due diligence.

The appellate Judge denies this without infringing the law. In view of the above state of affairs, there can be no question whatever of a *latent defect in the objective sense of the word*. This the donkey boiler, its funnel, its nearness to the bunker

Der Berufungsrichter verneint dies ohne das Gesetz zu verletzen. Von einem verborgenen Mangel im objectiven Sinn kann nach der Sachlage überhaupt nicht die Rede sein. Der Donkeykessel, sein Rohr, die geringe Entfernung desselben vom Bunkerschott legen zu Tage.

Dass der Mangel auch subjectiv bezüglich seiner Feuergefährlichkeit erkennbar war, geht aus den Aussagen der beiden nautischen Sachverständigen Sohst und Rhode und der des Sachverständigen Sammel hervor. Die beiden bekunden, dass sie, weil wiederholt durch in dieser Art ausgeführte Anlagen des Donkeykessels Feuer enstanden sei, regelmässig darauf dringen, beim Löschen die Ladung wenigstens baldmöglichst von der gefährlichen Stelle oberhalb des Donkeykesselrohres zu entfernen. Sie bezeichnen es ausdrücklich als Unvorsichtigkeit im vorliegenden Falle, dass man nicht baldmöglichst an dieser Stelle gelöscht hat. Der Sachverständige Stammel aber bezeichnet es als einen Mangel an Vorsicht, dass man das Rohr nicht genügend beachtet und nicht rechtzeitig sein Rothglühen bemerkt hat. Der Berufungsrichter zieht daraus ohne Gesetzverletzung den thatsächlichen Schluss, es sei unmöglich, dass nicht schon in früheren Fällen jedesmal eine mehr oder minder grosse Erhitzung im Bunkerschacht an der besonders gefährdeten Stelle wahrgenommen wäre oder doch hätte wahrgenommen werden müssen. Dann kann aber nicht davon die Rede sein, dass die Feuergefährlichkeit, aller Sorgfalt ungeachtet, nicht zu entdecken gewesen sei. Es ist selbstverständlich, dass es dabei nicht auf die Person des verantwortlichen Verfrachters ankommt, sondern auch auf die Möglichkeit der Entdeckung durch eine der Personen, für die er verantwortlich.

Darauf, dass die in Rede stehende Anlage des Donkeykessels nicht ungewöhnlich ist, kommt ebensowenig etwas an, wie darauf, dass nach der Meinung der Sachverständigen Sohst und Rohde dem Kläger solche Anlage nicht zum Vorwurf gemacht werden kann, wenn er sein Schiff klassificirt bekommen hat. Das ist keine gutachtliche Deposition mehr, sondern eine Rechtsauffassung, die nichts entscheided und ganz hinfällig ist, weil die Classification kein Gewähr dafür giebt, dass das Schiff zur Zeit keine Mängel hat, und den Verfrachter von seiner Haftung für Mängel, die nicht unentdeckbar sind, überhaupt nicht befreit.

Hanseatische Gerichtszeitung 1894, p. 151.

bulkhead, demonstrate. That the defect was subjectively perceptible, in reference to its danger of fire, is shown by the testimony of the two nautical experts, Sohst and Rohde, and of the expert Stammel.

Both state, that, as fires frequently arise through the donkey boilers being put up in this manner, they regularly insist that in discharging, the cargo is at least removed from the dangerous place above the donkey boiler as soon as possible. They call it negligence in the case at bar, that the cargo was not discharged from this place as soon as possible. The expert Stammel calls it, want of care, that the funnel was not sufficiently considered, and its red hot conditions not noticed in time. The appellate Judge legally draws therefrom the conclusion of fact, that it is impossible, that a greater or less heating, in the bunker shaft was not noticed every time at its especially endangered place, in previous instances, or if not, then it ought to have been discovered. And it is then impossible to say, that this danger of fire could not have been discovered with due diligence. *It is self-evident, that this does not only refer to the person of the responsible carrier, but also to the possibility of discovery by a person, for whom he is responsible.*

It is of just as little moment to say that the donkey boiler, as arranged in this case, is not unusual, as it is to say, that according to the opinion of the experts Sohst and Rohde, this arrangement of the donkey boiler is not to be charged against the plaintiff, because his ship was given a class. This is no longer a deposition of an expert, but a conclusion of law, which decides nothing, and goes for naught, *because this classification is no guarantee that the vessel has no defects at the time,* and does not exempt the carrier from his liability for defects which can be discovered.

§35. Ist es ordnungsmässig, wenn die Wassertanks schon während der Entlöschung des Schiffes aufgefüllt werden? Denkbare Ursachen für die Wasseransammlung im unteren Laderaum. Unzureichender Verschluss des Mannloches ist stets als auf einer Nachlässigkeit der Schiffsbesatzung beruhend zu erachten.

Bezugnahme des Connossements auf die Chartepartie. Haben die Bestimmungen der Chartepartie auch dann für den Empfänger zu gelten, wenn dass Connossement nur besagt, dass die Waaren are to be delivered at the aforesaid port in the like good order as per charteparty.

Ist ein Unfall, der sich während der Löschung der Ladung am Bestimmungshafen beim Füllen eines Wassertanks ereignete, ein accident of navigation? Bei Freizeichnung von accidents of navigation haftet die Rhederei nur dann nicht für die Folgen eines solchen accident, wenn kein Verschulden der Rhederei oder Schiffsmannschaft vorliegt.

Sivewright, Bacon & Co. als Rheder des engl. Schiffes *Castleventry* gegen Anton Nielsen & Co. in Bremen.

In dieser Hptbl. 1894 No. 26 referirten Sache wies das O. L. G. III. durch Urtheil vom 14. Juli 1894 die Klage ab.

ENTSCHEIDUNGSGRÜNDE:

In dem Zwischenurtheil vom 31 October 1893 ist ausgeführt dass die hier fragliche Beschädigung der Ladung auf einem accident of navigation beruht, für den die Klägerin zu haften hat, wenn der Rhederei, den Schiffer oder die Schiffsmannschaft ein Verschulden trifft, und in diesem Sinne erklärt der entscheidende Theil jenes Urtheils, dass die beklagtische Kompensationseinrede unbegründet sei, soweit sie sich nicht auf das von der Beklagten behauptete schuldvolle Verhalten des Schiffers oder der Schiffsbesatzung des *Castleventry* bei Auffüllung der Wassertanks stütze. In den Gründen jenes Urtheils ist dann weiter ausgeführt, dass die Beweislast bezüglich des angeblichen Verschuldens wegen der im Connossement enthaltenen Befreiungsclausel (all the dangers and accidents of the seas and navigation excepted) die Beklagten treffe. Diese Ausführungen hält das Berufungsgericht auch jetzt noch für zutreffend. Die Beklagte meint freilich, wenigstens im gegenwärtigen Falle müsse die Beweislast umgekehrt und von der Klägerin verlangt werden dass sie sich exkulpire, weil der Capitain den Schiffsbesichtigern die genaue Feststellung der Schadensursache—und zwar, wie be-

§ 35. Is it proper to fill the water tanks during the discharge of cargo? Probable cause for the gathering of water in the lower cargo hold. Insufficient fastening of the manhole must always be considered as arising from negligence of the ship's crew.

Reference in the bill of lading to the charter-party. Do the provisions of the charter-party apply to the consignee in a case where the bill of lading merely provides that the goods are to be delivered at the aforesaid port in the like good order, as per charter-party?

Is an accident, which happens while filling the water tanks, during the discharge of the cargo, an accident of navigation? In case of an exemption from liability for accidents of navigation, the owners are only exempt from liability for the consequences of such an accident in case no fault exists on the part of the owner or ship's crew.

Sivewright, Bacon & Co., as owner of the English ship *Castleventry* against Anton Neilsen & Co., in Bremen.

In this matter, reported vol. of 1894, No. 26, the Upper Land Court* Part III., dismissed the complaint, by its decree of July 14th, 1894.

GROUNDS FOR DECISION.

It is set forth in the interlocutory decree of October 31, 1893, that the damage to cargo here in question was caused by an accident of navigation, for which the plaintiffs are liable, in case fault is shown either in the owner, or the ship's crew; and in this sense the decreeing portion of that decision sets forth that the defendants' counterclaim for compensation is unfounded, in so far as it is not based on the defendants' allegation of faulty conduct of the owner or the crew of the *Castleventry* in filling the water tanks.

In the grounds for that decision it is further set forth, that the burden of proof is on the defendants in reference to the alleged fault, on account of the exemption clause con-

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*The three German courts through which a maritime suit may be carried are: the *Landgericht* (Land Court) or civil court of first instance; the *Oberlandesgericht* (Upper Land Court), an intermediate appellate court; and the *Reichsgericht* (Court of the Realm), which is the imperial court of final instance, sitting at Leipzig. The opinion here first given is by the *Hanseatische Oberlandesgericht* of Hamburg, presided over by Dr. Sieveking. An extract from an earlier opinion in this same case is translated as a note to 69 Fed. Rep., 475.

hauptet werde, absichtlich dadurch unmöglich gemacht habe, dass er nach Beendigung der Löschung schleunigst den Hafen verlassen habe. Ob diese Behauptungen thatsächlich richtig sind, ob die Beklagte sich auf die Art. 609, 610 H. G. B. für eine Verpflichtung des Capitains bei der Ermittelung der Schadensursache mitzuwirken, berufen kann und ob eine Erschwerung oder Verhinderung der Besichtigung durch den Capitain eine Veränderung der Beweislast herbeiführen würde, kann hier jedoch unerörtert bleiben, da durch die Beweisaufnahme die Ursache des Schadens soweit aufgeklärt ist, dass ein Verschulden der Besatzung angenommen werden muss.

Wenn allerdings die Beklagte dem Schiffer schon daraus einen Vorwurf macht, das er vor Beendigung der Löschung überhaupt mit den Auffüllen der Wassertanks vorgegangen ist, und wenn sie behauptet, dass diese Massregel nur der demnächstigen Reise habe dienen sollen und können, mit der hier fraglichen Reise aber keinen Zusammenhang gehabt habe, so ist das nicht richtig. Der Capitain White behauptet, er habe die Tanks Auffüllen lassen sowohl im Interesse des Schiffes, nämlich um bei fortschreitender Entlöschung dessen Stabilität zu sichern, als auch im Interesse einer gefahrloseren Entlöschung der Ladung. Es sei nämlich das Gewebe der Reissäcke,—wie dies auch durch die Atteste der Schiffsbesichtiger bestätigt wird—dünn und mürbe gewesen und die ohnehin vorhandene Gefahr, dass die Säcke platzen würden, um so grösser geworden, je höher bei fortschreitender Löschung das Schiff aus dem Wasser gekommen und je steiler damit der Steg geworden sei, auf dem man die Säcke vom Schiff in die Leichter habe hinabgleiten lassen.

Die Bremerhavener Schiffsbesichter Heincks und Ihlder und der Zeuge Köper wollen diese Behauptung des Capitains nicht durchweg als richtig gelten lassen. Zeuge Köper, dem als einen früheren Schiffscapitain man soweit eine Sachkunde nicht wird Absprechen können, sagt, die Bauart des Schiffes habe die Einnahme von Wasserballast keineswegs erforderlich gemacht, denn der Dampfer sei besonders breit, verhältnissmässig niedrig und in Boden anscheinend fast flach gewesen, er würde auch beim Sturm im Hafen haben stehen können. Auch der Sachverständige Schiffsbautechniker Ihlder erklärt, das Auffüllen der Tanks sei wegen der Bauart des Dampfers nicht nothwendig gewesen, er habe ohne Ballast stehen können, wie sich auch daraus ergebe, dass im Abgangshafen

tained in the bill of lading (all the dangers and accidents of the seas and navigation excepted). In this view the appellate Court still concurs. The defendants naturally contend, that at least in the present case the burden of proof ought to be reversed and the plaintiffs be required to exculpate themselves, because the captain made it impossible for the ship inspectors to ascertain definitely the cause of the damage, and it is asserted, purposely so, in that, after finishing the discharge, he quickly left port.

Whether this contention be true as a matter of fact, or whether the defendants can rely on Articles 609 and 610 of the German Commercial Code as an authority for the existence of an obligation on the master to lend assistance in the ascertainment of the *cause* of the damage, and whether the preventing of, or throwing obstacles in the way of, an inspection, on the part of the master, would bring about a shifting of the burden of proof, need not however be discussed here, because from the testimony, the cause of the damage is disclosed to this extent, that a fault on the part of the crew must be assumed.

If, however, the defendants reproach the master for the mere fact, that he started in to fill the water tanks before the completion of the discharge, and when they assert that this step was only intended for and could only serve the following voyage, and that it had no connection with the voyage in question, then that is not correct. Capt. White asserts that he had the tanks filled both in the interest of the vessel, that is, to secure her stability during the continued discharge, and in the interest of a safe discharge of the cargo.

It is a fact that the weaving of the rice bags—which is proved by the report of the ship inspector—was thin and dried out, and the existing danger of the bags bursting was increased the higher the ship rose in the water, during the continued discharge, and in consequence thereof, the steeper the skid grew, on which the bags were allowed to slide down into lighters from the vessel.

The Bremerhaven ship inspectors Heincks and Ihlder, and the witness Koeper, are unwilling to admit unqualifiedly the correctness of this contention of the captain. Witness Koeper who, being an ex-ship captain, must be given credit for a certain amount of expert knowledge, says, that the nature of the construction of the vessel, did by no means make it necessary

Saigon die Tanks nicht gefüllt gewesen seien. Ebenso wollen Ihlber und Köper auch nicht anerkennen, dass durch das Auffüllen der Tanks das Löschen der Ladung gefördert sei. Köper meint, um die Steilheit der Steige abzustellen, sei es gebräuchlich, mit Fortschreiten der Entlöschung die Leichter weiter vom Schiff abzulegen, und Köper wie Ihlder erklären, wenn der Capitain zur besseren Entlöschung das Schiff habe tiefer in's Wasser bringen wollen, so hätte er nicht die hinteren sondern die vorderen Tanks füllen lassen müssen,—und das sei, wie sie im Gegensatz zum Capitain behaupten, nicht geschehen. Köper und Ihlder kommen danach zu der Ueberzeugung, dass das Auffüllen der Wassertanks mit der Herreise in keinen Zusammenhang gestanden habe, sondern lediglich für die nächste Reise geschehen sei. Weniger ungünstig wird die Handlungsweise des Capitains von dem Sachverständigen Schiffs und Ladungsbesichtiger Heincks beurtheilt. Auch er glaubt zwar, dass das Schiff, da es seine grösste Breite unten hatte ohne Ballast habe stehen können, auch meint er, dass das Auffüllen zur Sicherung einer gefahrloseren Löschung nicht grade nothwendig gewesen zei, da man die Ladung, wenn die Stege zu steil seien, auch durch Strotten (Schlingen) aus dem Schiff habe entfernen können. Allein an sich sei es wohl zweckmässig, wenn der Capitain, um die Gefahr des Platzens der Säcke zu vermindern das Schiff durch Wasserballast tiefer gelegt habe; das sei auch während des Löschens gebräuchlich, man fülle die Tanks dann vorn und hinden gleichmässig auf, damit das Schiff sich gleichmässig senke. Wenn das Auffüllen der Tanks vor beendigter Löschung auch vielleicht nicht nothwendig gewesen sei, so sei es doch ordnungsmässig. Auch habe der Capitain sich darauf verlassen dürfen, dass die vor dem Antritt der Reise gedichteten Tanks noch Wasserdicht seien. Und ähnlich spricht sich auch der Sachverständige Woegens aus. Er verneint freilich, dass die fragliche Massregel für das Löschen der Ladung zweckmässig sei, und nimmt daher nicht an, dass der Capitain sie aus diesem Grunde vorgenommen habe. Dagegen erklärt er das Auffüllen der Wassertanks während des Löschens im Interesse der Stabilität des Schiffs keineswegs für ordnungswidrig, er bezeugt, dass jene Massregel vorsichtshalber auch anderweitig in Gebrauch sei, und giebt sein Gutachten dahin ab, dass dem Capitan kein Vorwurf treffe, wenn er sie,

to take in water ballast, as the steamer was particularly wide, relatively speaking, low, and the bottom apparently flat, and it could have been able to weather a storm in the harbor. And the expert vessel constructor, Ihlder, maintains that the filling of the tanks was not rendered necessary by the nature of the construction of the vessel, that it could have lain there without ballast; which is proved by the fact, that the tanks were not filled at Saigon, the port of departure. Neither do Ihlder and Koeper wish to admit, that by reason of the filling of the tanks, the discharge of the cargo was facilitated. Koeper claims that to remedy the steepness of the skid, it was customary, to place the lighters further from the vessel as the discharge progresses; and Koeper and Ihlder state, that if the captain, for the purpose of facilitating the discharge, had desired to give the vessel a deeper draught, he ought not to have had the rear tanks filled, but the forward ones, and this was not done, as they insist, in contradiction of the captain's contention. From this fact, Koeper and Ihlder are of the opinion that the filling of the water tanks had no connection with the home voyage, but was done solely in the interest of the next voyage. The actions of the captain are judged less unfavorably by the expert vessel and cargo inspector Heincks. Even he believes, that the vessel could have lain without ballast, owing to the fact, that its greatest width was at the bottom, and he also thinks, that the filling was not altogether necessary to insure a safe discharge, as the cargo could have been removed from the vessel, with slings, in case the skid was too steep. However, if the captain, to reduce the danger of the bags bursting, gave the vessel a deeper draught by means of water ballast, it was certainly expedient and the customary mode during the discharge, that then the tanks are filled evenly forward and aft, to insure an equal lowering. Even if the filling of the tanks before completing the discharge was not necessary, it was nevertheless proper. The captain was justified in supposing, that the tanks which were made tight before the voyage was entered upon, were still tight.

In a similiar manner the expert, Woegens, also expresses himself. He denies, as a matter of fact, that the act in question was necessary for the discharge of the cargo, and for that reason does not assume, that the captain resorted to it for

obwohl sie nicht geboten gewesen sei, zu mehrerer Sicherheit angeordnet habe. Nach diesen überzeugenden gutachtlichen Aeusserungen der Sachverständigen Heincks und Woegens ist jedenfalls soviel ausser Zweifel, dass das Auffüllen der Tanks zu einer Zeit, wo das Schiff noch im Löschen begriffen ist, an und für sich ebensowohl im Interesse der Stabilität des Schiffes und im Interesse der Löscharbeiten, mithin für die Zwecke der gegenwärtigen Reise geschehen sein kann, als für die demnächstige, so dass also keineswegs davon als von der Regel auszugehen ist, dass jene Massregel mit Rücksicht auf die neue Reise erfolge. Schon hiernach wird man garnicht davon reden können, dass in dem Auffüllen der Tanks während der Löscharbeiten an und für sich ein schuldhaftes Verhalten des Schiffers zu befinden sei. Es kommt aber hinzu, dass für den gegenwärtigen Fall die Behauptung des Capitains White, er habe den Wasserballast im Interesse des Schiffes und der Löscharbeiten, also für Zwecke der Herreise eingenommen, nach dem Gutachten der Sachverständigen keineswegs als widerlegt anzusehen ist. Ob die Auffüllung der Tanks auch der Löschung dienlich war, mag dahingestellt bleiben, da die Angaben des Capitains einerseits und Ihlders und Köpers andrerseits darüber auseinandergehen, ob auch die vorderen Tanks gefüllt worden sind. Jedenfalls war die Einnahme des Wasserballastes für die Stabilität des Schiffes, wie Heinck und Woegens bezeugen, wenn auch nicht nothwendig doch zu aller Vorsicht eine verständige Massnahme, es liegt daher kein Grund vor, der Behauptung des Capitains, dass ihn solche Rücksichten geleitet haben, zu misstrauen. Dass der Capitain damals gegenwärtigen Bedürfnissen hat entsprechen und nicht ausschliesslich Vorbereitungen für die demnächstige Reise hat treffen wollen, dafür spricht auch, dass das hier fragliche Auffüllen bereits am 9 Juni, also fünf Tage vor seiner am 14. erfolgten Abreise, ausgeführt worden ist.

Hiernach ist dem Capitain daraus, dass er zu jener Zeit die Tanks ausfüllen liess, an sich ein Vorwurf nicht zu machen, es war das keine ordnungswidrige Procedur. Es ist aber als bewiesen anzusehen, dass, sei es dem Capitain, sei es einer andern Person der Schiffsbesatzung, anderweitig ein schuldhaftes Verhalten bezüglish der behandlung der Wassertanks zur Last fällt, durch welches jene Massregel schadenbringend geworden ist.

the alleged purpose. On the other hand he holds that the filling of the water tanks during the discharge in the interest of the stability of the vessel, is not irregular; he testified, that this step is a matter of precaution and is in use elsewhere; and gives his opinion to the effect, that the captain is not liable to reproach, if he ordered it to be done for the sake of additional safety, although not absolutely necesssary.

In view of these convincing statements of opinions of experts Heinck and Woegens this much is beyond a doubt, that the filling of the tanks at a time when the vessel was still discharging, could of itself have been done just as much in the interest of the stability of the vessel and the interest of the work of discharging, and therefore in the interest of the present voyage, as of the following voyage; and therefore it must not be assumed at the outset that this step was taken with reference to the new voyage. For this reason alone, it cannot possibly be said that in the filling of the tanks during the discharge can of itself be found negligent conduct on the part of the master. But to this must be added that for the present case the assertion of Captain White that he took in water ballast in the interest of the vessel and the discharge, that is to say, for the purposes of the home voyage, is not to be regarded as disproved by the expert testimony. Whether or not the filling of the tanks aided the discharge may be left undecided, as the statements by the captain on the one hand, and of Ihlder and Koeper on the other, differ as to whether the forward tanks had also been filled. At all events, the taking in of water ballast, for the purpose of preserving the stability of the vessel, as is testified to by Heinck and Woegens, even if not necessary, was certainly a sensible and precautionary step, and there is therefore no cause for doubting the statement of the captain, that such reasons prompted him to do it.

That the captain was then desirous of providing for present needs, and had not sought to prepare exclusively for the next voyage, is shown by the fact that the filling here in question was done on June 9th, five days before the vessel's leaving port, which was on the 14th.

It therefore follows, that no fault is to be found with the captain for filling the tanks at the time he did, which was not an improper procedure. It must, however, be deemed proven

Nach der Beweisaufnahme, besonders nach dem Woegens-'schen Gutachten kommen als Ursachen für die Wasseransammlung in dem unteren Laderaum vier Möglichkeiten in Betracht. Wenn das Wasser aus den Ballasttanks herrührt, so wäre es an sich möglish, 1. dass der Tank leckgesprungen, oder 2. dass die Peil- oder Luftröhren geplatzt oder abgebrochen, oder 3. dass das Mannloch nicht geschlossen oder nicht gehörig gedichted gewesen ist. An sich wäre auch, 4. denkbar, dass, wie der Capitain meint, Wasser aus dem im Maschinenraum befindlichen Kessel durch das in Folge Einklemmens eines Fremdkörpers aufgesperrte selbstthätige Ventil in den Laderaum eingedrungen wäre. Die beiden ersterwähnten Möglichkeiten müssen jedoch im gegenwärtigen Falle als ausgeschlossen angesehen werden. Nach Woegens und Ihlders Meinung spricht dagegen schon die erhebliche Menge des ausgeströmten Wassers. Entscheidend aber ist, dass es sich in diesem Falle um einen Schaden an dem Tank gehandelt haben würde, der nur durch eine Reparatur hätte gehoben werden können. Wäre solche erfolgt, so hätte Capitain White davon sofort oder doch jedenfalls später Kentniss erhalten haben müssen (Woegens); es muss also nach der Aussage des Capitains, der davon nichts angegeben hat, angenommen werden, dass eine Reparatur in der That nicht stattgefunden hat. Dass der Capitain in dieser Beziehung bei seiner Vernehmung etwas verschwiegen haben sollte, ist um so weniger wahrscheinlich, als ein solcher Schaden des Tanks keineswegs auf einem von der Rhederei zu vertretenden Verschulden zu beruhen brauchte, diese Schadensursache vielmehr eher eine Exculpirung der Klägerin begründet haben könnte. Eine Reparatur an dem Tank würde aber auch längere Zeit erfordert haben, sie kann daher nicht erfolgt sein, da der Capitain, wie er bezeugt, nach Beendigung der Löschung und vor seiner in der Mittagsstunde desselben Tages erfolgten Abreise den Tank von Neuem hat auffüllen lassen. Ebenso aber ist es unwahrscheinlich, dass das Wasser aus dem vom Capitain bezeichneten Ventil, also aus dem Kessel, herstammt. Woegens erklärt, nicht annehmen zu können. das eine solche Wassermasse aus dem Machinenraum gekommen sei. Übrigens wäre doch Voraussetzung, dass gerade damals zur selben Zeit als der Tank aufgefüllt wurde, der Capitain oder der Ingenieur das Ablassen des Wassers aus dem Kessel angeordnet hatte; davon aber ist bisher keine

that, be it either on the part of the captain or on the part of some other member of the ship's crew, fault must be charged against some one in reference to the working of the water tanks, which caused the aforesaid filling to cause damage.

From the testimony taken, and especially from the opinion rendered by Woegens, it appears that four possible causes must be considered in determining the reason for the gathering of water in the lower cargo space. If the water had its origin in the ballast tanks, it would be possible, 1, that the tank sprung a leak ; 2, that the sounding tube or air pipe had burst, or been broken off ; or 3, that the manhole was not closed, or was not properly made tight.

Again it is also possible, 4, that, as the captain supposes, the water came out of the boiler in the engine-room and ran into the cargo space in consequence of some foreign substance being jammed in the automatic valve. The first two mentioned possibilities must, however, be looked upon as excluded in the case at bar. According to Woegen's and Ihlder's opinion, the large quantity of the water which ran out is opposed to them. It is certain, however, that there must have been a damage to the tank in this case of a nature which could only have been removed by being repaired. If repairs had been made, Capt. White would have received information concerning them, either immediately or at least a little later (Woegens); from the testimony of the captain, who said nothing, it must be assumed that, as a matter of fact, no repairs were made.

That the captain, in this regard, should have withheld something on his examination is all the less probable, as such a damage to the tank would not need to be based on a default, for which the shipowner was liable ; on the contrary, this cause of damage would much rather tend to exculpate the plaintiff. A repair of the tank would probably have required considerable time, and could therefore not have been made, as the captain testifies that he had the tank filled anew after completing the discharge, and before leaving port on a new voyage, at noon of that day. It is just as improbable that the water came from the valve designated by the captain or from the boiler. Woegens claims that it could not be inferred that such a quantity of water came from the engine room. Besides, it might also be supposed that just at the

Rede gewesen, auch der Capitain hat dies nicht gesagt, und es ist auch unter den Parteien bisher gar kein Zweifel gewesen, dass der Wassershaden mit dem Auffüllen der Tanks in ursächlichem Zusammenhang stehe. Nach Ihlder's Meinung ist dies auch die Ueberzeugung des Steuermanns gewesen, da dieser, als ihm Ihlder aufgab, für die Untersuchung die hölzerne Bekleidung der Tanks abzunehmen, eine Grimasse machte, die Ihlder dahin deutete der Steuermann wisse, woher das Wasser komme und man werde nun nichts mehr finden.—Dass das Wasser nicht aus dem Maschinenraum herstammen könne, weil es dann durch die Vermischung mit dem Bilgenwasser weit schmutziger gewesen sein würde, wird vom Zeugen Koeper behauptet und vom Sachverständigen Woegens dahin bestätigt, dass allerdings das Bilgenwasser immer Reste von Kohlen, öl und Twist mit sich führe, die an der von ihm durchnässten Ladung sichtbar werden würden. Obwohl nun wenig wahrscheinlich ist, dass in dieser Beziehung bei Koepers Beobachtungen ein Irrthum untergelaufen sein könnte, so muss doch dies an sich ohne Zweifel bedeutende Beweismoment ausser Beachtung bleiben, da der von der Klägerin durch Benennung von fünf Zeugen angebotene gegenseitige Beweis, dass nämlich das fragliche Wasser schmutzig, also kein reines Hafenwasser gewesen sei, nicht erhoben ist. Es bedarf aber auch einer Feststellung dieses Punktes nicht, weil schon nach dem vorher Ausgeführten nicht anzunehmen ist, dass das Wasser aus dem Maschinenraum stammt.

Es bleibt sonach nur die Möglichkeit, dass das Wasser aus dem Mannloch ausgeströmt ist, mag dieses nun überkaupt nicht verschlossen oder nicht gehörig gedichtet gewesen sein. Bei dieser Annahme erklärt sich auch einerseits, dass das Wasser in grosser Menge ausströmen könnte und andrerseits, dass der Mangel, nachdem das Wasser ausgepumpt war, sofort entdeckt und schnell und ohne Reparatur abgestellt werden konnte. Das konnte in der einfachsten Weise geschehen, ohne dass der Capitain davon Kenntniss erhielt. Es ist sehr wohl denkbar, dass, nachdem der unzureichende Verschluss des Mannlochs entdeckt war, dies sofort gedichtet worden ist und dass man dem Capitain, um dessen Vorwürfen zu entgehen, davon keine Mittheilung gemacht hat. Es steht also der Annahme, dass das Wasser dem Mannloch entströmt ist, nicht

time when the tank was being filled, the captain or the engineer had ordered the discharge of water from the boiler; again, up to the present time there has been no mention of this fact, the captain himself did not say it, and as between the parties there has been no doubt heretofore that the water damage stood in a casual relation to the filling of the tanks. According to the opinion of Ihlder, this was also the conviction of the mate, as he, when instructed by Ihlder to remove the wooden coating of the tanks, made a grimace, which Ihlder construed to mean that the mate knew whence the water came, and that nothing more would be found. The fact the water could not have come from the engine-room, as then being mixed with bilge water, it would have been much dirtier, is asserted by witness Koeper, and is in so far concurred in by expert Woegens, that the bilge water always contains coal dust, oil and twist, which would have been obvious from the cargo thereby saturated. Although it is unlikely that in this respect there was a mistake made in Koeper's observations, this particularly matter of proof may be disregarded because the testimony of the five witnesses named by the plaintiff to prove in rebuttal that the water in question was dirty, and there was no clean harbor water, was not offered. It does not require a decision on this point, because it cannot be inferred from the previous reasoning, that the water came from the engine-room.

Therefore the only possibility which remains is that the water came from the manhole, it being immaterial whether it was not closed at all, or not sufficiently made tight. This finding explains on the one hand, why the water could come in great quantities, and on the other hand, why the defect, after the water was pumped out, was immediately discovered and remedied quickly and without repairs. This could be done in the simplest manner, and without the captain's learning it. It is very probable, that after the insufficient fastening of the manhole was discovered, it was immediately made tight, and that no mention of it was made to the captain, to escape his reprimands. The inference that the water came from the manhole is not at all opposed to the assertion of Capt. White, that he, after the cargo was discharged, together with the cargo inspectors (that is to say, with persons, whom he supposed to be such), examined the manhole and found it closed and in-

entgegen die Aussage des Capitains White, er habe, nachdem die Ladung gelöscht gewesen sei, mit den Ladungsbesichtigern (d. h. mit Leuten, die er für solche gehalten habe) das Mannloch untersucht und es geschlossen und intact befunden ; dann sei auf Veranlassung jener Herren der Tank noch einmal aufgefüllt und es habe sich ergeben, dass das Mannloch dicht sei.

Der unzureichende Verschluss des Mannlochs aber beruht, wie auch der Sachverständige Woegens bestätigt, unter allen Umständen auf einer Nachlässigkeit der Schiffsbesatzung, für die die Rhederei aufzukommen hat.

Das R. G. verwarf am 23. Januar 1895 die Revision der Klägerin.

AUS DEN GRÜNDEN :

Wenn die Revision geltend macht, dass zu der "Ablieferung" der Güter, wegen deren auf die Chartepartie Bezug genommen ist, nicht allein der für die Ablieferung bestimmte Hafen, sondern auch die Art und Weise der Ablieferung gehöre, so mag dies im Allgemeinen zugegeben werden. Unzutreffend ist aber die weitere Folgerung, dass unter der Art und Weise der Ablieferung der Güter auch der Umfang der Haftung des Verfrachters für deren Verlust oder Beschädigung zu verstehen sei. Ebenso unerheblich ist der Hinweis der Revision auf den Umstande, dass zu den Connossementen gedruckte Formulare benutzt seien, bei welchen die hinzuzufügenden Worte von der Stellung und Grösse der freigelassenen Lücken abhängig gewesen seien. Denn die Rechtsfolgen der Verwendung von Connossements-Formularen, welche nicht geeignet sind, den Willen des Ausstellers durch ihre Ausfüllung im vorliegenden Falle klar zum Ausdrucke zu bringen, können nicht den Empfänger, sondern nur den Verfrachter treffen. Uebrigens zeigt das beigebrachte Original-Connossement ganz deutlich, dass das Formular genügenden Platz geboten hätte, die in englischen Connossementen sonst sehr übliche Clausel "all other conditions as per charterparty" einzurücken. Dass eine solche allgemeine Bezugnahme im vorliegenden Falle unterblieben ist, spricht gerade gegen die Klägerin. In welchem Sinne die zunächst betheiligten englischen Befrachter und Ablader die an ihre Order aus-

tact; and that then at the request of those gentlemen, the tanks were again filled, and it then appeared, that the manhole was tight.

The insufficient shutting of the manhole, as is confirmed by the expert Woegens, in all circumstances arose from the negligence of the ship's crew, for which the shipowners are liable.

The Imperial Court dismissed the appeal of the plaintiff on January 23d, 1895,

On the following grounds:

The contention of the appellant, that to the "delivery" of the goods, on behalf of which reference is made to the charter-party, belongs not only the port, designated for the delivery, but also the *manner* of delivery, can ordinarily be conceded.

Not to the point, however, is the further contention, that by "*the manner of the delivery* of the goods is to be understood also the extent of the *liability* of the owner for loss or damage. Just as irrelevant is the reference of the appellants to the circumstance that printed blanks are used for the bills of lading, in which the words to be added depend on the place and size of open spaces. For the legal consequences from using bills of lading blanks, which are not adapted to express clearly in the case at bar the intention of the maker cannot affect the shipper, but only the shipowner. Moreover the original bill of lading, which was provided, shows very clearly that the blank offered sufficient space, to insert the clause which is usually contained in English bills of lading: "All other conditions as per charter-party." The mere fact that such a general reference was omitted in the case at bar, speaks directly against the plaintiff. Which interpretation the persons primarily interested, the English consignor and consignee, may have given to the bills of lading made out to their order, is also irrelevant, because the defendant firm, in acquiring the bills of lading were justified in giving to them an interpretation which was usual according to the German language and law.

While the lower Court assumes from this, without violating legal maxims, that to determine the legal relations between the parties, only the bill of lading clause should be considered, according to which the plaintiff has stipulated against its

gestellten Connossemente verstanden haben mögen, ist ebenfalls unerheblich, da die Beklagte bei der Erwerbung der Connossemente berechtigt war, dieselben in dem Sinne auszulegen, welcher ihnen nach deutschem Rechte und Sprachgebrauch beizulegen ist.

Indem das Berufungsgericht hiernach ohne Verletzung von Rechtsnormen annimmt, dass für das Rechtsverhältniss zwischen den Parteien nur die Connossementsclausel in Betracht komme, nach welcher die Klägerin sich freigezeichnet hat von "allen Dangers and Accidents of the Seas and Navigation of whatever nature and kind" bejaht es aus zutreffenden Gründen (und übrigens auch zu Gunsten der Klägerin) die zwischen den Parteien weiter streitige Frage, ob der im vorliegenden Falle sich erst im Abladehafen ereignende schadenbringende Unfall, das Eindringen von Wasser in den Schiffsraum bei Füllen der Tanks, als ein accident of navigation zu gelten habe. Es nimmt aber—und zwar ebenfalls mit Recht—an, dass hiermit die Nichthaftung der Klägerin noch nicht entschieden sei, da diese nur unter der Voraussetzung eintrete, dass der Unfall ohne Verschulden der Rhederei und der Schiffsbesatzung entstanden ist, indem eine derartige Clausel lediglich eine Umkehrung der Beweislast dahin bewirke, dass, während sonst der Verfrachter das Vorliegen höherer Gewalt nachzuweisen haben würde, jetzt der Befrachter oder Empfänger ein Verschulden der Gegenseite zu behaupten und nachzuweisen habe.

Ein solches Verschulden hat nun die Beklagte in verschiedenen Richtungen behauptet und das Berufungsgericht hat nach mehrfachen Beweiserhebungen durch Vernehmung von Zeugen und Sachverständigen die Ursache des Schadens für soweit aufgeklärt erachtet, dass ein Verschulden der Besatzung des Schiffes angenommen werden müsse.*

* * * * * * *

Das Berufungsgericht führt aus, es sei sehr wohl denkbar dass, nachdem der unzureichende Verschluss des Mannloches entdeckt war, dieses sofort gedichtet wurde und dass man dem Capitain, um dessen Vorwürfen zu entgehen, davon keine Mittheilung machte; der Annahme, dass das Wasser dem Mannloch entströmt sei, stehe also die Zeugenaussage des Capitains

* The same omission is in the original.

liabllity, from "all dangers and accidents of the seas and navigation of whatever nature and kind" it answers in the affirmative, and on pertinent grounds (and moreover also in favor of the plaintiff), the additional question in dispute between the parties, whether or not in the case at bar, the accident which caused the damage and which happened in the port of discharge, to wit, the entering of water into the hold of the vessel, while filling the tanks, is to be considered an accident of navigation. But it assumes, and moreover justly so, that this does not yet decide the non-liability of the plaintiff, because the latter only occurs on the presumption, that the accident happened without the fault of the shipowner, or the ship's crew, inasmuch as such a clause of itself brings about a shifting of the burden of proof to this extent, that, while ordinarily the owner would have to prove the existence of *vis major*, it is now the consignor or consignee who must allege and prove a fault on the part of the other side.

Such a fault the defendant firm has alleged in various directions, and the lower Court, after repeatedly taking proofs by hearing witnesses and experts, has considered the cause of the damage in so far established, that fault on the part of the crew of the vessel must be inferred.

The lower Court argues, that it is very probable that, after the insufficient fastening of the manhole was discovered, it was immediately made tight, and that to avoid the reproaches of the Captain, no report was made to him about it; the assumption, that the water ran from the manhole, is not in conflict with the testimony of Capt. White, which is to the effect that he, after the cargo was discharged, inspected the manhole with the cargo inspectors (that is to say, with the persons which he took to be such) and found it locked and intact, and that then, at the suggestion of those gentlemen, he had the tank filled again, and it was hereby shown that the manhole was tight.

This is a finding of fact, to make which the Court below was absolutely justified under § 259 of the Civil Procedure Act, which authorizes and makes it the duty of the Court to freely weigh the proofs, and this finding is binding on the appellate Court, in so far as it is not shown, that it was influenced by error in procedure. This is, however, not the case, and in particular the exceptions taken thereto by the

White nicht entgegen, dass er, nachdem die Ladung gelöscht gewesen sei, mit den Ladungsbesichtigern (d. h. mit den Leuten, welche er für solche gehalten habe) das Manhloch untersucht und es geschlossen und intact befunden habe, und dass dann auf Veranlassung jener Herren der Tank noch einmal aufgefüllt und sich dabei ergeben habe, dass das Mannloch dicht war.

Dies ist eine thatsächliche Feststellung, zu welcher das Berufungsgericht vermöge der ihm nach § 259. der C. P. O. zustehende und obliegenden freien Beweiswürdigung durchaus berechtigt war, und welche für das Revisionsgericht bindend ist, sofern dieselbe sich nicht als durch processuale Verstösse beeinflusst erweisen sollte. Das ist aber nicht erfindlich und insbesondere erscheinen auch die dieserhalb von der Revision erhobenen Rügen nicht als gerechtfertigt. Weshalb das Berufungsgericht es nicht dahingestellt lassen durfte, ob das Mannloch überhaupt nicht geschlossen oder nur nicht gehörig gedichtet war, ist nicht einzusehen, wenn nur—wie das Berufungsgericht mit dem Sachverständigen Woegens ohne rechtsgrundsätzlichen Verstoss annimmt auch schon der unzureichende Verschluss des Mannlochs unter allen Umständen auf eine Nachlässigkeit der Schiffsbesatzung zurückzuführen ist, für welche die Rhederei aufzukommen hat. Ebensowenig ist die Rüge begründet, dass die blosse Denkbarkeit einer inzwischen hinter dem Rücken des Capitains hergestellten Dichtung des unzureichenden Verschlusses des Mannloches keine genügende Unterlage für eine thatsächliche Feststellung sei, was namentlich im vorliegeuden Falle gilt, wo es sich lediglich um die Würdigung eines aus einer ganzen Kette von Beweis und Gegenbeweis-Gründen in Betracht kommenden Umstandes handelt. Endlich war das Berufungsgericht an seiner thatsächlichen Feststellung auch dadurch nicht behindert, dass der Sachverständige Woegens selbst nur erklärt hatte, vielleicht sei nur des Mannloch des Tanks nicht geschlossen oder nicht genügend gedichtet gewesen. Denn die Sachverständigen dienen dem Richter nur als Gehülfen zur Erforschung der Wahrheit oder Nichtwahrheit streitiger Thatsachen und der Richter ist an ihr Gutachten bei seiner thatsächlichen Würdigung keineswegs gebunden."

Hanseatische Gerichtszeitung, 1895, Part I., p. 85.

appellant are not sustained. It is not apparent why the Court below did not ignore the point, whether the manhole was not fastened at all, or merely not made properly tight, provided —as the Court below and also the expert Woegens infers— without infringing on legal principles—that the insufficient closing of the manhole could, in all circumstances, be traced to negligence of the ship's crew, for which the owner is liable.

The exception is also unfounded, that the mere probability of the making tight of the insufficient closing of the manhole, behind the back of the master, is no sufficient basis for a finding of fact, which is especially important in the case at bar, where it is merely a question of weighing one circumstance arising for consideration, in a whole chain of evidence *pro* and *contra*. And finally the Court below was not hampered in making its findings of fact, because the expert Woegens had only declared, that *probably* the manhole of the tank was not closed, or not made sufficiently tight. For the experts merely serve the purpose of aiding the Judge in ascertaining the truth or untruth of disputed facts, and the Judge in his appreciation of facts is in no way bound by their opinion.

§26. Verantwortlichkeit des Verfrachters bei der Connossements-Clausel: "Frei von Beschädigung." Haftung für Schaden durch Bruch des Füllrohres eines Tanks.

Apenrader-Actien-Brauerei-Gesellschaft in Apenrade gegen die deutsche Dampfschiffs-Rhederei in Hamburg.

Das O. L. G. I, erkannte am 30. Januar, 1892, dass der Anspruch der Klägerin wegen Beschädigung von 99 Kisten Export-bier, welche mit dem beklagtischen Dampfschiff *Bellona* im October, 1887, von Hamburg nach Hiogo von der Klägerin verladen sind, dem Grunde nach berechtigt sei.

ENTSCHEIDUNGSGRÜNDE.

Die hier in Betracht kommende Befreiungs-Clausel des vom Schiffer der *Bellona* gezeichneten Connossements lauted: "Höhere Gewalt, des Kaisers oder des Reiches Feinde, Piraten, See- oder Landräuber, Zwang durch Fürsten, Regenten oder Völker, Wurmfrass, Regen, Spritzwasser, ungenügende Verpackung, oder gewöhnliche Abnutzung oder Zerreissen der Emballage, Ungenauigkeiten, Auslöschungen oder Fehler der Marken, Nummern, Addresse oder Beschreibung der verladenen Waaren, Leckage, Bruch, Rost, innerer Verderb, Verlust oder Schaden durch Kohlenstaub während der Reise, Verlust oder Schaden durch die Maschine, Kessel oder durch Dampf, wie auch immer verursacht, oder durch Collision, Strandung oder Wrackwerden, wie auch immer verursacht, oder durch Explosion, Hitze oder Feuer an Bord, im Lagerschiff oder sonstigen Fahrzeug, oder am Lande, wie auch immer verursacht, oder durch Ausdünstung oder Geruch von anderen Gütern, über Bordwerfen, Baratterie, Vergehen, irrthümliche Auffassung, Nachlässigkeit oder Fehler des Lootzen, Capitains, der Seeleute, der Maschinisten, oder anderen Personen im Dienste des Schiffes, gleichviel, ob in der Navigation des Schiffes oder sonstwie, Risiko des Lagerschiffes, Leichter und sonstiger Fahrzeuge, Umladung and Beförderung in anderen Schiffen, und alle und jede andere Gefahr oder Zufälle der See, des Landes, von Kanälen oder Flüssen und der Schiffahrt, von welcher Natur oder Art sie auch sein mögen, sind ausgenom men, und ist das Schiff weder Verantwortlich für irgend welche Folgen von allen ausgenommenen Ursachen wie sie auch entstanden sein mögen, noch ist das Schiff verantwortlich für

§ 26. Liability of the shipowner under the bill of lading clause, "Free from injury." Liability for damage caused by breaking of a feed pipe of a tank.

Apenrader Stock Brewing Co. in Apenrade
vs.
The German Steamship Owners Company in Hamburg.

Upper Land Court, Part I, held on Jan. 30th, 1892, that the demand of the plaintiff for damage to 99 cases of export beer, which were shipped by plaintiff on the defendant's steamship *Bellona* in October, 1887, from Hamburg to Hiogo, was justified.

GROUNDS OF DECISION.

The exemption clause, here to be considered, contained in the bill of lading signed by the master of the *Bellona*, read that "*vis wajor*, the Emperor's or the Empire's enemies, pirates, sea or land robbers, restraint of princes, rulers or people, vermin, rain, spray, insufficient package, or unusual wear and tear of packages, incorrectness, insufficiency or absence of marks, numbers, addresses or description of the goods shipped, leakage, breakage, rust, internal decay, loss or damage by coal dust, during the voyage, loss or damage by the engine, boiler or by steam, howsoever caused, or by collision, stranding and becoming a wreck howsoever occasioned, or by explosion, heat or fire on board, in craft or other vessel, or on shore, however occasioned, or by evaporation or smell of other goods, jettison, barratry, fault, error in judgment, negligence or default of the pilot, master, mariners or engineers or other persons in the service of the vessel, whether in navigating the vessel or otherwise, risk of craft, lighter, or other vessel, trans-shipment and forwarding in other vessels and all and every other perils or accidents of the seas, land, canals or rivers, and of navigation, of whatever kind or nature they may be, are excepted, and the ship is neither responsible for any consequences, of any

incorrecte Ablieferung, es sei denn, dass jedes Collo von dem Verschiffer vor der Verladung deutlich mit dem Namen des Bestimmungshafens in mindestens zwei Zoll langen Buchstaben bezeichnet worden."

Das L. G. beurtheilt die Tragweite dieser Clausel nicht richtig, wenn es ihr eine weitergehende Bedeutung beigelegt wissen will, als der allgemein lautenden Clausel "frei von Beschädigung." Richtig ist nur, dass im Fall der Zeichnung des Connossements mit der Clausel "frei von Beschädigung" der Verfrachter für Beschädigung nur haftet bis zu dem gegen ihn zu führenden Beweise des Verschuldens des Schiffers oder einer sonst von dem Verfrachter zu vertretenden Person, während nach der Befreiungs-Clausel des Connossements der *Bellona* deren Rhederei auch die Haftung für Vergehen irrthümliche Auffassung, Nachlässigkeit oder Fehler des Lootsen, Capitains, der Seeleute, der Maschinisten oder anderer Personen im Dienste des Schiffes, gleichviel in der Navigation oder sonstwie, ablehnt. Insoweit also der Befrachter seinen Schadensanspruch wegen Beschädigung seiner Güter nur aus Verschulden einer Person der Schiffsbesatzung zu gründen in der Lage ist, steht er allerdings nach dem Connossement der *Bellona* schlecter als nach einem einfach "frei von Beschädigung" gezeichneton Connossement. Andererseits ist aber seine Stellung, wenn dass Connossement nicht allgemein "frei von Beschädigung" gezeichnet ist, insofern wiederum eine günstigere, als er von dem an sich exculpationspflichtigen Verfrachter die Darlegung erwarten darf, dass die geschehene Beschädigung der Güter auf eins der Vorkommnisse zurückzuführen, für deren Folgen in der Befreiungsclausel des Connossements die Haftung ausgeschlossen ist. Die Beklagte hat sich darauf beschränkt, sich im Allgemeinen auf die vorstehend ausgeschriebene Connossementsclausel zu berufen. Es ist aber nicht erfindlich, welche Bestimmung mit Klaren Worten die Haftung für eine Beschädigung ausschliessen sollte, die, wie im vorliegenden Fall, dadurch entstanden, dass das vom Maschinenraum durch den Laderaum nach dem hinteren Peak-Tank führende Rohr gebrochen und in Folge dessen Wasser in den Laderaum eingedrungen ist. Während beispielsweise nach Regel II. der seinerzeit von den Handelskammern von Hamburg und Bremen empfohlenen allgemeinen Regeln für Dampfer-Connossements, wie notorisch, der Rheder nicht verant-

of the excepted causes, however they may have arisen, nor is the vessel liable for incorrect delivery, provided that each bale, before its loading on board, shall have been plainly marked by the shipper with the name of the port of destination with letters at least two inches in length."

The Land Court did not judge the import of this clause correctly, if it sought to give a greater effect to this than to the common clause, "free from injury." It is only correct, that in the case of signing a bill of lading containing the clause, "free from injury," the ship-owner is only liable for such injury caused by the fault of the master or any other person, representing the owner, which the shipper must prove, whereas according to the exception clause contained in the *Bellona* bill of lading, her owner also excepts liability for fault, error in judgment, negligence and default of the pilot, master, mariners or engineers, or other persons in the service of the vessel, either in the navigation or otherwise.

In so far as the shipper is able to base his claim for indemnity for damage to his goods only on the fault of one of the ship's crew, he is certainly in a worse position with the bill of lading of the *Bellona* than with a bill of lading containing the ordinary "free from injury." On the other hand, if the bill of lading has not the general clause "free from injury," then his position is so far a more favorable one, because he has a right to require from the owner the proof, that he is free from fault, that the damage sustained by the goods can be traced to one of the causes, for the consequences of which the exceptions in the bill of lading exempt him from liability.

The defendant has confined itself to relying on the foregoing bill of lading clause. It is not evident, however, which part of it is intended in clear language to exclude the liability for injury, which, as in this case, arose in consequence of the breaking of a pipe leading from the engine room through the cargo space into the after peak tank, and causing water to enter into the cargo space. While, for example, as is well-known, the ship-owner is not responsible for the "bursting of the steam boilers or pipes," according to Rule II. of the general rules for steamship bills of lading, recommended at the time by the Chambers of Commerce of Hamburg and Bremen—among the specially enumerated possible causes of damage,

wortlich ist für " Platzen von Dampskesseln oder Rohrleitungen," findet sich unter den im Connossement der *Bellona* ausdrücklich aufgeführten einzelnen möglichen Schadensursachen, für welche die Haftung des Schiffes abgelehnt wird, keine, unter welche der Bruch einer Rohrleiting von dem Maschinenraum nach einem der Peaktanks zu bringen wäre. Die allgemeine "Äusserung am Schluss" alle und jede andere Gefahr oder Zufälle der See, des Landes, von Kanälen oder Flüssen und der Schifffahrt, von welcher Natu order Art sie auch sein mögen, sind ausgenommen," schützt die Beklagte nicht, denn der Bruch des Füllrohrs eines Tanks kann wohl, muss aber nicht nothwendig auf die Gefahren oder Zufälle der Seeschifffarth zurückzuführen sein. Es wäre jedenfalls Sache der Beklagten gewesen, nachzuweisen, dass die letztere Annahme für die in Hamburg angetretene Frachtreise der *Bellona* zwingend sei. An dieser für die beklagtische Berufung auf die Befreiungs Clausel unverlässlichen Voraussetzung fehlt es jedoch. Die Sache liegt deshalb für die Beurtheilung nicht anders, als sie liegen würde, wenn die Beklagte in Ermangelung irgend welcher Befreiungs-Clausel lediglich nach Massgabe H. G. B., Art. 607, wegen Beschädigung der eingenommenen klägerischen Güter sich zu exculpiren hätte. Dazu reicht aber auch hier der Hinweis auf die nackte Thatsache des Bruchs des Füllrohrs nicht aus, denn es liegt, wie schon erwähnt, nichts vor, was die Einwirkung höherer Gewalt, wie die Beklagte sie nachweisen soll, anzunehmen gestattete. Der Bruch ist constatirt am 8 November, 1887, noch auf der Elbe, während das Schiff bei Brockdorf Nebels wegen vor Anker lag und bei Gelegenheit der Füllung des hinteren Peaktanks. Seit seinen Abgang von Hamburg am 6 November hatte sich ausweise der Verklarung durchaus nichts Ungewöhnliches ereignet. Der Beklagten bleibt aber nach H. G. B., Art. 607 Abs. 2, die Möglichkeit sich, wie sie auch eventuell gethan, aus dem Gesichtspunk zu exculpiren, dass sie, den schadhaften Zustand des Füllrohrs schon vor Antritt der Reise der *Bellona* vorausgesetzt, geltend macht, es sei derselbe aller Sorgfalt ungeachtet nicht zu entdecken gewesen und deshalb die Beschädigung der klägerischen Güter einer durch höhere Gewalt veranlassten, also von ihr nicht zu verantwortenden gleichzuachten. Indessen auch in dieser Richtung ist der Exculpationsversuch der

contained in the bill of lading of the *Bellona*, for which the liability of the ship is absolved, none is found, which could cover the bursting of a pipe line from the engine room to one of the peak tanks.

The general statement at the end, to wit : "All and every other perils or accidents of the seas, land, canals or rivers and of navigation of whatever kind or nature they be, are excepted," does not protect the defendant. The bursting of the feed pipe of a tank can possibly be traced to the perils of navigation, but not necessarily so. Unquestionably it would be incumbent on defendant to show that an inference of sea perils can be applied to this freighting voyage of the *Bellona*, begun at Hamburg. This hypothesis, which would be indispensable to sustain the defendant's appeal, however fails. Hence, for the purpose of this decision, the master is in the same position as if the defendant had no exemption clauses ; and had to absolve itself for injury to goods received solely under Art. 607, of the Commercial Code.

For this purpose, the reference here to the bare fact of the bursting of the feed pipe, does not suffice. As already stated, there is no ground to infer an effect of *vis major*, which the defendant must prove. The break was discovered on November 8th, 1887, on the occasion of filling the after peak tanks while the ship was off Brockdorf on the Elbe, having anchored on account of fog. Since leaving Hamburg on November 6th, as the protest shows, nothing unusual had happened.

The defendant has remaining the possibility of freeing itself by Art. 607, § 2 of the Commercial Code ; and it did eventually take the view, that, assuming the defect in the feed pipe existed at the beginning of the voyage of the *Bellona*, it could not have been discovered in spite of all care ; that therefore the injury to plaintiff's goods is to be considered as due to *vis major* for which the defendant is not responsible.

But even here, the effort on the part of the defendant to exculpate itself has failed. The Appellate Land Court was convinced from the testimony before it, that the feed-pipe in question was not only defective at the inception of the voyage of the *Bellona* from Hamburg to Hiogo, but also that this de-

Beklagten misslungen. Das O. L. G. hat aus dem vorliegenden Beweismaterial die Ueberzeugung geschöpft, dass das fragliche Füllrohr nicht nur schon bei Antritt der Reise der *Bellona* von Hamburg nach Hiogo schadhaft war, sondern auch dass dieser Mangel des Schiffs nicht als ein solcher gelten kann, welcher aller Sorgfalt ungeachtet nicht zu endecken war.

(Wird näher ausgeführt.)

Ist aber davon auszugehen, dass das Füllrohr zum hinteren Peak-Tank by Antritt der Frachtreise der *Bellona* beschädigt war, sei es, dass es bereits gebrochen, sei es, dass es auch nur geborsten war und es erst nach Antritt der Reise in Folge der Bewegung des Schiffs oder aus anderen Ursachen brach, so kann der Beklagten nicht zugegeben werden, dass dies ein Mangel des Schiffs war welcher aller Sorgfalt ungeachtet nicht zu entdecken war. Wie es dem Verfrachter, welcher seiner Verpflichtung, ein seetüchtiges Schiff zu stellen, nachzukommen beflissen ist, vor Allen obliegt, sich zu vergewissern, dass das Schiff in allen für die Aufnahme der Ladung bestimmten Theilen gegen das Eindringen des Wassers von aussen wohlgesichert ist, so hat er auf die völlig seetüchtige Beschaffenheit derjenigen Vorrichtungen sein besonderes Augenmerk zu richten, welche der Durchführung von Wasser durch den Laderaum dienen. Wenn deshalb ein in nächster Nähe eines diesem Zwecke dienenden Tank-Füllrohrs fussender Raumstützen auf der Herreise der *Bellona* gebrochen war, so erheischte es die von der Beklagten nach H. G. B. Art. 560, 607[2] aufzuwendende Sorgfalt, sich zu vergewissern, dass auch das neben der Pfanne des Stützen liegende Füllrohr keinen Schaden gelitten. Auf das Gegentheil durfte die Beklagte, wie schon erwähnt, aus dem Umstand nicht schliessen, dass die Holzverkleidung des Rohrs sich intact erwies denn man musste wissen, das die Holzverkleidung neben der Pfanne, in welcher der Stützen stand, einen Ausschnitt hatte. Wenn der Sachverständige Stammel sich dahin geäussert, dass er sich nicht veranlasst gesehen haben würde, die Holzbekleidung, wenn er sie intact befand, wegreissen zu lassen, so hängt diese Auffassung mit seiner nicht zu billigenden Ueberschätzung der Bedeutung der Unversehrtheit der Holzbekleidung für die daraus zu folgernde Unversehrtheit des Rohrs zusammen. Ein Ausfluss derselben

fect in the vessel cannot be considered one which could not be discovered in spite of all care.

(Treated in detail.)

But if we are to start with the view that the feed-pipe to the after peak tank was damaged at the inception of the freighting voyage of the *Bellona*—also assuming that it was merely cracked, and only broke after starting on the voyage, in consequence of the movements of the vessel, or through some other cause, it cannot however be yielded to the defendant that this was a defect of the vessel, which could not be discovered in spite of all care.

The duty of the shipowner who diligently tries to meet his obligations to furnish a seaworthy vessel, is above all to make sure that all parts of the vessel intended for the reception of cargo are well protected against the entering of water from the outside; *and he must give his especial attention, that all those arrangements are in an absolutely seaworthy condition, which serve to convey water through the cargo space.*

If, therefore, a supporting post, close to where a tank feed pipe serves such a purpose, was broken on the inward voyage of the *Bellona*, the diligence imposed on defendant by Arts. 560, 607 of the Com. Code makes it necessary to assure one's self that the feed pipe lying next to the supporting socket has sustained no injury. On the contrary, as already stated, the defendant should not presume from the circumstance that the wooden casing of the pipe proved to be intact; for it ought to have been known that the casing beside the socket, in which the support stood, had a portion cut out.

If the expert Stammel has intimated that he would not have considered himself bound to have the wooden casing torn away when he found it intact, this view depends upon his over estimate (not to be concurred in) of the significance of the uninjured condition of the wooden casing, from which the uninjured condition of the pipe is assumed.

It would be in line with this view of the expert, on finding the wooden casing uninjured, not even to consider it necessary to examine the socket for possible injury to the same. An inspection of the socket was all the more important because an injury found on it would furnish very good ground for considering it necessary to examine the pipe lying next to it. Engineer

Auffassung wird es sein, wenn der Sachverständige bei constatirter Nichtbeschädigung der Holzverkleidung auch nicht einmal eine Untersuchung der Pfanne auf etwaige Beschädigung für geboten erachtet. Eine Untersuchung der Pfanne war vielmehr um so wesentlicher, weil eine an ihr gefundene Verletzung für die Nothwendigkeit einer Untersuchung des daneben liegenden Rohrs einen besonders beachtenswerthen Anhaltpunk gegeben hätte. Der freilich nicht als Sachverständiger vernommene Ingenieur Robert Pohl spricht sich übrigens in seinem Schreiben, wie schliesslich erwähnt werden mag, gleichfalls für die hier vertretene Nothwendigkeit einer Prüfung der Rohrleitung auf ihre Wasserdichtigkeit nach beendeter Reparatur des Stützen und vor Einnahme der Ladung aus.

Bei nichtgelungener Exculpation der Beklagten wegen der den Gütern der Klägerin in Folge Bruchs des Füllrohrs zugefügten Beschädigung war demnach der Klägerische Auspruch dem Grunde nach als gerechtfertigt anzuerkennen.

Hanseatische Gerichtszeitung, 1891, p. 70.

Robert Pohl, who, it is true, was not taken as an expert, also speaks in his statement, which can properly be mentioned here, in favor of the necessity of testing the pipe as to its water-tight condition, after completing the repairs to the support, and before taking in cargo.

The defendant not having succeeded in exculpating itself for the damage done the goods of the plaintiff in consequence of the bursting of the feed pipe, it was proper to find that the demand of the plaintiff was justified.

JUN 3 1895
JAMES H. McKENNEY,
CLERK

1044

Brief of Kirlin for Appellee

Filed June 3, 1895.

SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE PETITION OF JOSEPHINE W. WUPPERMANN FOR A WRIT OF CERTIORARI IN THE CASE OF JOSEPHINE W. WUPPERMANN

Appellant

against

THE STEAMSHIP *CARIB PRINCE*, JAMES KNOTT, CLAIMANT

Appellee

BRIEF IN OPPOSITION

CONVERS & KIRLIN
Proctors for CARIB PRINCE

J. PARKER KIRLIN
Advocate

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

JOSEPHINE WUPPERMANN, *Libelant, Appellant,* AGAINST The Steamship "CARIB PRINCE," JAMES KNOTT, *Claimant, Appellee.*	No. 146.
	Brief for Appellee.
THREE OTHER CASES AGAINST THE SAME.	Nos. 147, 148, 149.

Statement.

These are appeals by the libelants from a decree dismissing the respective libels in the District Court for the Eastern District of New York.

The damage for which recovery is sought occurred on the voyage of the *Carib Prince* from Grenada to New York, in September, 1893, and amounts to $5,179.79. A rivet in the bulkhead, between the peak tank and the No. 1 hold gave way, shortly after the tank was filled at sea on the passage, and water entering the No. 1 hold through the rivet hole, damaged libelants' cargo. This rivet was on the port side

of the bulkhead, near the ship's side, and a few feet above the floor of the No. 1 hold. It was the end rivet towards midship in a series which attached a transverse strengthening brace or "knee tie" to the bulkhead on the inside of the tank. It was headed up on the hold side of the bulkhead.

The District Judge found, *upon libelants' evidence* (fols. 142–144, 133), that the rivet gave underneath and behind the head which was knocked up in a countersunk hole on the hold side of the bulkhead plating, owing to a latent defect, probably caused by too much hammering in the construction of the ship, as the rivet was cooling off, and that accordingly the loss was within an exemption against "latent defects" contained in the bill of lading. It was admitted upon the record that the exemption made a valid contract according to British law, which the Court found should govern the construction of the contract (*Opinion*, p. 166).

Facts.

1. *The testimony and charter-party.*

Libelants' counsel, in his brief, frequently cites the evidence of Engineer Keyes, Captain Legge, Chief Officer Scott, Carpenter Hopkins, &c., as though their evidence, being that of the officers and crew of the steamer, should be conclusive upon the claimant. It is important, therefore, to point out that none of the servants of the steamship, at the time this loss occurred, were the servants of the shipowner, the claimant herein, but were all servants of the charterer, Mr. George Christall (fols. 256, 439), and that Engineer Keyes and Captain Legge were *produced and examined as witnesses for the libelants* (fols. 19, 104).

It should also be pointed out that both of the log books of which libelants make frequent use were kept by the

servants of the charterer (fols. 256, 439), not by the servants of the shipowner, and are not, therefore, binding upon the ship as admissions, but only upon the charterer.

Another misleading assumption in libelants' brief is that the charter party (p. 148) has a bearing on these controversies. The libelants are not in privity with this charter-party, and in no position to claim that the express warranty of seaworthiness, contained in it, inured to their benefit. That was simply a stipulation as between George Christall, charterer, and James Knott, owner, in the agreement by which the steamship was hired to Christall for the period of four years (fols. 437, 438). Libelants, in their pleading, did not allege the charter-party, nor any part of it; they founded their action wholly upon the bills of lading, which they claimed had been issued by the steamship as a common carrier, and therefore bound her, irrespective of other engagements (fol. 5). These bills of lading (pp. 145, 147) contained no reference to the charter-party, which was introduced in evidence solely for the purpose (fol. 257) of showing that Mr. Engineer Keyes and the other members of the crew were not servants of the shipowner, and that their statements or admissions should not be taken as the statements or admissions of the claimant.

Mr. Engineer Keyes was what is known as a guaranty engineer, that is, an engineer whom the builder of the engines selects to work them during the first months of service, in order to see that they come up to the terms of the guaranty under which they are provided (fol. 415); hence the clause in the charter-party which gave the shipowner the privilege (fol. 439) of appointing engineers [selected by his engine builders]. Like the other servants of the ship, this guaranty engineer was *paid* by the charterer (fol. 439); in effect was his servant.

2. *Character and construction of the vessel.*

The *Carib Prince* was substantially a new vessel. She was built to order, for Mr. George Christall, who operates a line of steamers known as *The Trinidad Line*, from New York to Trinidad in June, 1893 (fols. 437, 20). She was an all-steel steamer of 1,304 tons net register and of 2,500 tons dead weight capacity (fol. 457). She was built by builders of the highest reputation in England, and at an expense considerably in excess of the usual cost of vessels of this class (fol. 413). She was designed to be and was an exceptionally fine vessel. Every possible care was taken in construction to insure the seaworthiness and fitness of the vessel.

The charges of unseaworthiness relate solely to the bulkhead and to the wooden flooring over the bilges. It is alleged that the rivet holes had not been opposite each other when the particular rivet in question was inserted; that a drift pin was used to "fair" the holes, and that the rivet was thereby weakened, and moreover was of poor and defective metal.

A full synopsis of the whole evidence produced by the claimant, showing the care and diligence employed in the construction of this ballast tank will be found *infra*, pages 33, 34, in the argument based upon the Harter Act. The sum of it is that the best obtainable rivets were used; that fair tests of them were made during the construction; that the riveting was done by expert men, employed solely for water-tight work; that every rivet was tested by two men with the hammer test; that the bulkhead was twice tested by water in the presence of Lloyds' surveyor, once when the steamer was above 10 feet by the stern; that the specifications for the vessel generally and for strengthening this tank exceeded the requirements of Lloyds'; that she was built in accordance with those specifications, under the personal supervision

of the shipbuilder, of the foreman riveter, of an inspector employed by the shipowner, of Lloyds' surveyor, and of the naval architect who designed the ship. The proof of due diligence in the construction of the vessel is irrefragible and uncontradicted.

3. *The drift pin charge and alleged defect in the rivet.*

Libelants called a witness of the name of Quinn, who, without any knowledge of the methods employed in shipbuilding in England, made the extraordinary statement that where a series of rivets have to be inserted in a series of holes through over-lapping plates a tapering piece of steel called a drift pin is used to bring holes which are not directly opposite each other in the plates into line by springing or stretching the plates (fol. 339). They also attempted to show that the holes in this case had not been even when the rivets were inserted, but had apparently been made so (fol. 355), although other evidence of the libelants said they had not been made so (fols. 147, 353). Quinn claimed that two holes being out of line $\frac{1}{8}$ of an inch weakened the rivet one-third (fol. 371). Saunders says the amount the holes were out of line, if anything, did not exceed $\frac{1}{16}$ of an inch, which would not affect the strength of the rivet at all (fol. 255).

Although libelants' witness, Keyes, stated that after the broken part of the rivet was driven out of the hole, it appeared to him that the holes in the different plates through which it passed were not perfectly true, he does not state the extent to which the holes were out of "fair," nor that this weakened or had anything to do with the giving way of the rivet. On the contrary, his evidence is that it broke from another cause. This rivet was at the midship end of the knee tie. The tank was of triangular shape. The heaviest pressure of the water coming against the mid-

ship part of the bulkhead possibly may have sprung it off a trifle from the knee tie on the inside of the tank, after the end rivet was gone, so that if the finger were put through the holes in the different outlapping plates, it might have felt as though the edges of the holes were not exactly true, although in point of fact they may have been true before they sprung apart.

This suggestion is borne out to some extent by the testimony of Saunders, who stated that he put his finger through the holes, in New York, before the bulkhead was repaired, and that they were then substantially fair (fols. 252–255). This evidence libelants attempt to disparage by the suggestion that the holes had been cut out by that time, but there is no evidence to that effect. The riming out, if there was any, presumably occurred at the time the new rivets were put in, and at the time Saunders saw the tank the rivets had not been put in, nor had preparations for putting them in been made (fol. 152). The holes at that time were filled by a bolt with a nut on it, which was taken off for examination (fol. 253).

The evidence of the builders leaves no room for doubt that the holes were not untrue (*infra*, pp. 33, 34). In the first place, the holes through the plates were $\frac{3}{4}$-inch holes, and the rivets put in were $\frac{3}{4}$-inch rivets. Obviously, had the holes not been true, the rivets would not have gone in. In the next place, they state that wherever holes are not perfectly true, they are made true by putting in the rimer and riming out the hole until the holes became true and a larger rivet was inserted (fols. 180, 198, 215, 230, 246, 199).

The use of the drift pin, they say, is exclusively limited to the purpose of cleaning the holes in case any dirt or rust may have accumulated in them; that is, before the rivet is put in, the drift pin, bathed in oil, is inserted in the holes (fols. 194, 193, 178, 212, 243–4).

It is self-evident that if the holes had been an eighth of an inch out of line, as suggested by Quinn and Clarke (wooden shipmaster), the use of the drift pin would not have sufficed to stretch a five-eighths of an inch cold steel plate so as to bring one hole fairly over the other. The evidence of the witness Quinn being contrary to common knowledge, in an essential particular, should be received with caution (The *Thomas Melville*, 31 Fed., 486, 487).

It is further claimed that the rivet itself was externally bad, because it appeared to have been headed up a little more on one side than on the other. This is drawing it fine. Any one who has seen hot iron riveted, will know that it is a matter of great nicety to do the hammering so as to have the head perfectly round and equally distributed on both sides of the centre of the rivet. As this rivet head went into a countersunk plate, and both sides of the head fully filling up the countersunk hole, it is obvious that the strength of the rivet was unaffected by the fact that a little more of the head was hammered up on one side than on the other.

Examined by the Court, even the witness Quinn admitted that he constantly passed rivets which were not perfectly true as good and fair work (fol. 374).

After each fresh rivet is put in, in the course of construction, the last two rivets behind it receive further hammering (fol. 143). After that, each individual rivet was twice tested with a hammer to ascertain that all is tight, and that no rivets have been broken in heading them up. After that, again, the tank was tested twice by water pressure, in the presence of the builders, a representative of the owner, and of Lloyds' surveyor, and no defect being disclosed, the tank was passed by all as sufficient and satisfactory.

Notwithstanding all these efforts, it is claimed that the

iron of the rivet in question had become crystallized by a trifle too much hammering, after it had cooled off. This appeared from the evidence of libelants' witness Keyes, who testified upon the point as follows:

Q. Are you familiar enough with qualities of iron to say whether this rivet is of good quality or not (Claimants' Exhibit 6)? A. I am, sir.

Q. Is it good or not? A. No, sir.

Q. What is its defect in your judgment? A. Inferior iron, short and brittle, without a fibre.

Q. Has that been annealed? A. Yes, sir.

Q. Might not this condition of fibre have been produced by too much hammering when it was annealing? A. Yes, sir.

Q. When a line of rivets are put in in construction they usually work on three at a time, do they not? A. Yes, sir.

Q. And every time they put in a new one they tighten the one behind it, do they not? A. They tighten the second one behind it, yes; sir.

Q. As the iron is cooling, if the second one behind is hammered too much, that will produce a crystalline character in the iron, will it not, and will give it the appearance of being short and brittle? A. Yes, sir.

Q. That is the appearance that this had? A. Yes, sir (fols. 142–144).

4. *The cause of the damage.*

The vessel left Trinidad two feet by the stern (fols. 284, 79). Three or four days out, the captain apparently thought he could make a little better speed by bringing her on a more even keel, and accordingly, he directed the peak tank, which holds 83 tons of water, to be filled. Libelants lay stress upon the fact that he said he considered it absolutely necessary for the proper trim of the vessel to fill this tank, but the context of his evidence clearly show that it was in no wise necessary for

safety, but was simply done for convenience, and in the hope of making better speed (fols. 40, 79–81).

After the damage was done, the tank was pumped out, and the vessel reached New York without further casualty, which shows that it was not "necessary" for any purpose to fill the peak tank on the passage (fol. 80).

The tank was filled up on the afternoon and night of September 3d. During the time the tank was being pumped up, the engineer's log (Apostles, p. 162) shows "ship rolling." The mate's log on the evening of September 3d shows "strong breeze," and later "fresh breeze" (p. 159). The direction of the wind was E. N. E. The course of the vessel was N. W. by N. ½ N. The wind and sea were therefore substantially abeam, and would tend to induce rolling.

There was some doubt on the evidence whether the water was discovered in the No. 1 hold on the morning following the filling of the tank, or on the second morning. Capt. Legge, called by the libelants, and testifying from recollection, said the water was found on the following morning (fol. 32); on referring to the mate's log he later agreed with the entry there made that it was found on the second morning. The carpenter, who had personal supervision of the filling of the tank and of sounding it and the No. 1 hold during the process, stated that the water was found on the morning following the filling of the tank (fols. 323, 325, 326). The District Judge found that the water was discovered in the No. 1 hold on the morning after the tank was filled (fol. 475), *and no error is assigned by libelants to this finding.*

It is customary to sound the different holds through a sounding pipe which leads to the limbers immediately forward of the bulkheads in the holds, every morning and evening. The carpenter testifies that such soundings were regularly made, and the fact further appears by the

log (fols. 321, 328 and pp. 159, 160). No water was found in the No. 1 hold when it was sounded on the evening before the accident (fols. 325, 335)—whether that be the night the tank was filled or the following night—and when sounded on the next morning, a large quantity of water was discovered (fols. 325-326, 333). The No. 1 hatches were then opened and a part of the cargo removed from the bulkhead at the point where a sound of entering water was heard, and it was discovered that a rivet head had dropped off, which was lying on a bag underneath the hole, and a stream of water was rapidly pouring in (fols. 284-286). The hole was plugged up with a wooden plug (fol. 285). The pumps were immediately started, the sluiceways in the limbers were opened, and additional holes were bored in the limber boards to allow the freer escape of the large quantity of water (fols. 326, 327, 331, 332). It was found there had been, perhaps, three feet of water in the after part of the hold, and of course something less in the forward part (fol. 283).

The sluiceways in the limbers and the valves in the direct pipes leading from the No 1 hold to the engine-room had been closed, as usual at sea, during the night, which accounted for the accumulation of water found in the morning (fols. 321, 322, 287, 288). The floor of the limbers was open enough for water to pass through (fols. 327, 332), but of course none did pass through after the limbers were full until the pumps were started and the sluices opened. The charge of unseaworthiness as to the limber boards is unsupported by any competent proof.

5. *Filling the tank at sea.*

The tank was triangular, and held 83 tons of water (fol. 258). With the rolling of the ship, it is evident that the swashing about of the water produced an enormous strain

in the acute angle of the junction of the bulkhead with the curving side of the ship. The rivet which carried away was on the port side, at the end of the knee tie or strengthening brace which led along the side of the ship and at an angle across the inside of the bulkhead. It was attached to the bulkhead by a series of rivets, of which the one that broke was at the midship end of the brace. Only one rivet head had broken, although some others were strained so as to be "weeping," that is, showing dampness (fol. 207) around them (fols. 48, 49, 114, 116, 118, 141, 150, 151, 269, 271, 284, 397), and subsequently some of those rivets were removed and renewed (fol. 254). The Court found that but one rivet had been broken (fol. 475), which was the sum of the evidence. The statement of one of libelants' witnesses, that he saw two rivets gone, relates to a time after the ship had been in port and when preparations for repairs had been made. If he saw two rivet holes at all, he doubtless saw them at the time when one of the "weeping" rivets had been knocked out after arrival in port.

No error was assigned to the finding of the District Judge that the water came through one rivet hole.

The evidence leaves no doubt that filling the tank at sea is a dangerous matter under any circumstances, and ought not to be done, except in the face of some extreme emergency, and that then the ship should be stopped. Captain Congdon, who has been surveyor to Lloyds in New York for many years, spoke from knowledge on this subject, and mentioned an instance where the bulkhead had been broken down by filling the tank at sea (fols. 397, 398, 404, 405).

Saunders, an experienced sea captain, and Martin, an engineer surveyor, also testified to the same effect (fols. 258, 415, 272).

Their evidence is not disputed. In the hand books issued

for the guidance of shipmasters, the danger of filling tanks at sea is specially dwelt upon.

Thus in *Mitcalfe's Suggestions to Mariners* (Newcastle, 1886), it is said:

"No. 29. The captain of a steamer—well loaded with grain or other perishable cargo, the disc just awash—should not be persuaded, while steaming at sea, to fill any of the ballast tanks *under the cargo*, to alter the trim and increase the speed; success is doubtful at the best, while, even if the tank is tight to commence with, the engineer will probably leave the sea cock open after the tank is full, and strain it. Certainly a claim for damage to cargo will result, and may, perhaps, be the most fortunate result of a reckless and willful act, of improper navigation.

"No. 30. It is time enough to think of filling the tanks when required to stiffen the vessel—say, after much fuel has been consumed—and, unless it is the engine-room tank, let the captain think twice before doing it, and reflect that he opens a three-inch hole in one bottom without seeing the other one or knowing where the water goes. Being in charge of many lives and a valuable cargo, he will do well to watch this risky operation from start to finish, and himself order the sea cock to be closed, or see it done, or he may find himself personally liable if damage results from neglect of this precaution.

"No. 109. Remember also that it is exceedingly dangerous to run up your ballast tanks at sea when the vessel is rolling, as there may be a difficulty in filling them, or the tank tops may be injured by the water rushing from side to side."

It is, of course, impossible for the claimant to dispute the testimony of libelants' witnesses as to the condition of the sea when the tank was filled. If, after the damage was discovered, they felt the need of covering up and extenuating their conduct, it was open to them, without

hope of contradiction, to make any entry in the log which might be sufficient for their purpose.

The logs are open to some suspicion, arising from a conflict between the statements as to when the damage was discovered, as stated therein, and as stated in the evidence of the captain and of the carpenter, speaking from recollection. The District Judge apparently discredited the logs upon this point, as he finds the damage was discovered on the morning following the filling of the tank, whereas the logs say it was the second morning. Be that as it may, it is clear from the engineer's log that the entry in the mate's log is incorrect. The mate's log says the weather was fair and fine and sea smooth; the engineer's log says the ship was "rolling" when the tank was filled, and the direction of the wind, as shown by the mate's log, supports the engineer.

Whatever the truth be as to this, it is certain that the rivet had been able to stand the tests applied by Lloyds' surveyor upon passing this tank three months before, when the ship was new (fol. 20), without disclosing any weakness in the tank, whereas filling it at sea caused the rivet to part.

As this tank is triangular in shape, and the angle at each end of the bulkhead where it joins the ship is an acute angle, it is evident that the swashing about of the water would bring an extraordinary strain upon that part of the bulkhead where the rivet broke, so that the probabilities tend to support the notion that the improper action of the officers in filling the tank at sea contributed to, if it did not cause, the breaking of the rivet head.

6. *The August hurricane.*

It appeared from the evidence that on the outward passage towards the West Indies, ten days before this cargo

was laden on board, the vessel had passed through a severe hurricane.

In connection with an argument founded upon the Harter Act, it was suggested that possibly the rivets may have become strained by the working of the vessel in that storm. The evidence of Keyes, however, showed that such was not the case; that the rivet had not been broken from strain, but from the crystalline character of the iron (fols. 142–144). Nevertheless the experience of the vessel in that storm affords the libelants a text for preaching a sermon upon the duty of minute examination of the rivets of the vessel and of the application of the hammer test to each rivet in every case after a steel steamer has passed through a storm, and for the omission to make such a test in the present case, a charge of negligence and of unseaworthiness was brought forward. Unfortunately for this argument, it appeared that a most careful examination of the particular place where this rivet was located was made by the engineer after the storm. It is true that he did not go down into the tank "for a practical examination," as the libelants point out, but after he got down there, he made it his business to make a most thorough-going examination. We quote his evidence as to this, which being libellant's own evidence, ought to conclude their theory upon this point:

Q. Did you make an examination of the interior of the tank [after the hurricane]? A. Not a practical examination. I made an examination just to satisfy myself, to have a look at the formation of the tank principally; it was the first time I had seen it; *I didn't go with the intention of examining whether there was any damage or not, but I made that my business when I was down there.*

Q. Did you examine to see whether there was any damage? A. Yes, sir.

Q. Did you look at the collision bulkhead? A. Yes, sir.

Q. Did you look at the knee tie? A. Yes, sir, wherever there were rivets.

Q. Was there any coating or wash on the forward side of the bulkhead? A. Yes, sir, a coating of Portland cement.

Q. Was that over all the rivets? A. The rivets and the bulkhead as well.

Q. Did you notice that any rivets were started on the inside? A. I couldn't tell that any had been started.

Q. Had the cement been started? A. Not that I could see.

Q. You say you examined wherever there were rivets on the inside of the tank? A. Yes, sir.

Q. How long were you down there? A. Upwards of an hour (fols. 130-131).

Q. On what day was it that you went down into this tank first after this storm? A. On the morning of the 22d of August.

Q. The vessel was then at sea? A. Yes, sir.

Q. Did anybody go with you? A. No, sir.

Q. And it was your first visit to the interior of the tank? A. Yes, sir.

Q. How did you get down into it? A. Through a manhole door.

Q. Was there a ladder to go down into it? A. Yes, sir; three ladders.

Q. Inside? A. Inside.

Q. Permanent? A. Permanent ladders.

Q. Did you carry lights with you? A. I did.

Q. In what shape? In the shape of a torch and a lantern?

Q. And you say you found it all lined with Portland cement? A. Yes, sir.

Q. How thick was that lining? A. A heavy wash—washed with a solution of cement in paste form.

Q. What would you take that to mean in thickness, a heavy wash? A. It materially differs; depends upon the surface it is put on. Put a coat of cement about one-sixteenth of an inch thick, and about the rivets would be thicker and clumsier.

Q. You found nothing to indicate any starting of the cement? A. According to appearances.

Q. Well, you saw it and you are telling us what you saw? A. Yes, sir.

Q. Was there cement on all the sides of the tank as well as the bulkhead? A. Yes, sir.

Q. And on the floor of it? A. There is no floor in it.

Q. It comes down to a flat surface on the bulkhead side, doesn't it? A. No, sir; it is wedge shaped at the bottom of the ship.

Q. Was that portion of the tank which formed the bottom of the tank also covered with cement? A. Yes, sir; not only with a wash but with a body of cement.

Q. Was the top of it, which is the underside of the between-decks there, also washed with cement? A. I am not sure of that.

Q. Could you by means of these ladders examine every portion of that interior? A. Yes, sir; and without the assistance of the ladders.

Q. Why, part of it is twenty feet high, isn't it? A. Yes; but you have got intermediate stringers that you could stand on.

Q. This particular beam to which this angle iron is attached is inside of this tank? A. Yes, sir.

Q. At what height above the bottom of the tank is that beam? A. From the ship's bottom?

Q Yes? Six feet or more.

Q. Did you look at that beam at all? A. I was on top of it.

Q. Was that also covered with cement? A. Yes, sir.

Q. Was the cement perfect there? A. Apparently (fols. 134–138.)

The notion that every rivet on a ship must be tested with a hammer after a storm is certainly novel. After such a test is applied to the rivets when first inserted, it is not supposed that any further hammer tests are necessary. Certainly, nothing in the evidence shows it is ever practiced; nor does the evidence show that it would have been

effective in the present case to discover the weakness of this particular rivet. Indeed, the evidence shows the contrary. The rivet head, which was picked up by mate Scott, showed that the break across the iron was a new break (fol. 37), and, as it broke at the bottom of the countersunk part of the head, it is evident it could not have been broken in August and still have stayed on the face of the bulkhead. Its own weight would have caused it to drop out.

The conclusion must, therefore, be that the August hurricane had nothing to do with the accident, which was really caused either by a latent defect in the material of the rivet or by the negligence of the ship's crew in filling the tank at sea, under the circumstances then existing, in the manner adopted.

POINTS.

I.

The libelants' loss, if caused by a latent defect in the rivet, was within the exception of "loss or damage from * * * accident to or latent defects in hull, tackle, boilers and machinery or their appurtenances," contained in the bill of lading.

The assignment of errors does not bring in question the finding of the District Judge that the damage was caused by a latent defect in the rivet, which did not arise through any fault of the shipowner. The fact is apparently conceded; it is only the sufficiency or legality of the exception that is brought in question on this appeal (fols. 488, 489).

But the sufficiency and the legality of the exception were both conceded by stipulation in the record, provided the Court should find English law was to be applied to its construction.

At the opening of the trial mutual admissions were made (fol. 19.) Libelants agreed:

"It is admitted that under the English law, the language of the bill of lading made a valid contract."

The District Judge found that the rights of the parties were to be expounded by English law. The bill of lading was signed and delivered in an English port, and the cause of action arose at sea, outside the limits of our jurisdiction. On familiar principles, therefore, it was a proper case for the application of English law.

Liverpool v. *Phœnix*, 129 U. S., 397.
The *Majestic*, 60 Fed., 624, 627.
Bank of Edgefield v. *Farmers' Mfg. Co.*, 2 U. S. App., 282, 295.
Fonseca v. *Cunard*, 153 Mass., 553.

No error was assigned to the conclusion that English law should be applied.

As the record stands, therefore, libelants have not in their assignment of errors laid the foundation to question the finding that the damage was caused by a latent defect in the rivet which was there through no fault of the shipowner, nor the conclusions that English law should be applied, and that by that law the exception afforded complete exemption from the loss.

The conclusion that the exception is valid and covers the loss under British law is sound, both upon principle and authority.

This exception against latent defects was obviously inserted for the purpose of exempting the ship from some liability to which, without such exception, she would be subject. It evidently was not intended to apply to mere breakages of machinery, which should occur after the voyage began, since the breaking of sound machinery

through stress of weather is treated as an inevitable accident or peril of the sea, for which the ship would not be liable, whether there were an exception or not (The *Virgo*, 3 Asp., 285; The *William Lindsay*, L. R., 5 P. C., 338).

Moreover, by its terms, this exception applies also to latent defects *in hull* and its appurtenances, showing clearly thereby its design to include latent defects existing at the time of shipment.

The exception, then, must be referable to latent defects in the hull, appurtenances and machinery existing at the time the voyage began. Of course, it does not apply to negligent defects, or to those which might have been discovered by the exercise of ordinary care, but, as to any latent defects, this exception was plainly designed to exonerate the carrier.

There are but few cases, either in this country or in England, where the direct question has been presented; but in all those similar exceptions are treated as valid and binding.

Thus, in the *Miranda*, L. R., 3 Adm. & Ecc., 561, a steam vessel became disabled at sea in consequence of her machinery breaking down. Her cargo had been shipped under bills of lading which contained "accidents from machinery" among the excepted perils. Another steamship, belonging to the same owners, fell in with the disabled vessel, towed her into port, and took proceedings against the cargo to recover salvage. The defense was that the *Miranda* was unseaworthy. The Court held, first, that there was no sufficient evidence to find that she was unseaworthy at the time the cargo was shipped, and even if there were, that the exception of "accidents from machinery" exonerated the vessel from the consequence of such breakage, and rendered the cargo liable for its proportion of salvage.

The *Laertes*, 12 Prob. Div., 187, was a similar case,

wherein the cargo was proceeded against for salvage. One set of the bills of lading under which the cargo was shipped contained, among other excepted perils, the clause: "Owners not to be liable for loss, detention, or damage * * * if arising directly or indirectly * * * from *latent defects* in boilers, machinery or any part of the vessel in which steam is used, even existing at the time of shipment, providing all reasonable means have been taken to secure efficiency." The *Laertes* broke down from a latent defect in her machinery, which could not have been discovered by the exercise of reasonable care; and it was held that the exception of latent defects, if it did not abrogate, at all events limited, the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage. The case is directly in point.

In England the *Laertes* is accepted as authority for the view that an exemption from "latent defects" simply, relieves the shipowner from damage arising from such cause.

Pollock on Bills of Lading, 39.

There is not an intimation anywhere in an English text book or case that the exception of "latent defects" does not apply to such defects existing at the time of shipment.

Notwithstanding that the bill of lading is to be expounded by English law, it is now argued on the authority of the *Caledonia*, 15 Sup. Ct. Repr., 537, 156 U. S.—that the exception cannot apply except to matters arising after the vessel has sailed in a thoroughly seaworthy condition; in effect that it applies only to latent defects arising after the ship sails. According to this view, the true reading of the sense of the exception would be "loss or damage

from latent defects arising after the ship sails are mutually excepted."

What an absurd and senseless jargon this would be. To what sort of a case could it apply? What possible liability of the shipowner, not covered by any other of the usual exceptions, could it apply to? What possible design could a sane shipowner be presumed to have in mind in inserting such a clause?

One of the familiar rules of construction in such cases is to look at the liability which would have existed without the exception, and to inquire whether the language employed is apt to relieve the shipowner from it. On this principle it is easy to see what the exemption was meant to cover. Notwithstanding the utmost diligence in construction and the most perfect freedom from negligence, the law held the owner for damage arising from latent defects. When freights were large and profitable, vessels could afford to be under such liabilities. With the introduction of exemptions the freight rates have gone down. It has often been said that the shipper receives a consideration for these exemptions in a reduced rate of freight (The *Wells City*, 61 Fed., 857; The *Persian Monarch*, 23 Fed., 820, 823). There is no liability of the owner from which a Court ought to be more willing to afford him exemption than that for latent defects, because of his freedom from fault. The bare statement that the defect is latent shows it has baffled and must baffle the extremest diligence and care. Under the German Code a latent defect is treated as *force majeur* (Section 607). That a shipowner should wish to be relieved from this extraordinary and unique liability is natural and probable. That the exception of "latent defects" was introduced in bills of lading for this purpose seems too clear for doubt. It is impossible to conceive of any other design for the insertion of this exception.

It is not denied in the *Caledonia* that apt words showing a design to limit the absoluteness of the implied warrant of seaworthiness may be inserted in a bill of lading and that the clause will then relate back to the time of shipment and modify the warranty. All that was really decided in that case on this point was that the exception of "defects" in machinery did not, in the opinion of five out of eight of the justices, show a mutual intent to limit or modify the implied warranty, by exempting the ship from the consequences of a *latent* defect. While "defects" in ordinary language include those which are latent, yet the Court construing the word against the shipowner in effect says, if he meant to exclude liability for "latent" defects (which was the *Caledonia* case), he should have said so.

This case was there referred to in argument It is noticeable that the possible meaning of a "latent defects" exemption is not alluded to in the majority opinion. Referring to the *Laertes*, the Court said:

"These exceptions were held to limit the implied warranty of seaworthiness in accordance with the expressed intention of the parties to that precise effect, and for that reason only to take the case out of the general rule."

And as if to save cases like the present from the rule of the *Caledonia* case, the Court added:

"*We are not dealing with the question of how far exceptions may be given effect in particular cases*, but whether by those under consideration claimants were exempted from liability for unseaworthiness, and we are clearly of opinion that they were not.

In the dissenting opinion of Mr. Justice BROWN, in which Mr. Justice HARLAN and Mr. Justice BREWER concurred, the decisions in this case and that of The *Curlew*, 8 U. S. App., 405, were expressly named and approved.

The ground on which the *Caledonia* was decided at Circuit played an inconspicuous part in the decision on appeal. After the case had been disposed of on other grounds the opinion said:

"Moreover, the words 'delays,' 'steam boilers and machinery or defects therein,' formed part of a long enumeration of the causes of damages, all the rest of which related to matters subsequent to the beginning of the voyage, and, by another familiar rule of construction, they should be treated as equally limited in their scope."

That principle fails of application in the present case because the exception here applies to "accidents to or latent defects in *hull*," &c.—one matter, certainly, not "subsequent to the beginning of the voyage."

With all deference, it is submitted that to apply the rule referred to in as plain a case as the present, would be to defeat the clear expressed intention of the parties by a fictitious presumption of their intention.

In conclusion, it should be pointed out that the English rule in regard to the scope and extent of these exemptions is more liberal than that alluded to in the *Caledonia*. As stated by *Carver, Carriage by Sea*, § 58, it is:

"When, however, a bill of lading has been given and taken, its provisions must be considered to relate back and apply to what has been done in regard to the shipment before it was given. It is to be taken as the expression of the contract under which everything has been done. Thus the exceptions of risks contained in it apply to the stowage of the goods, although that may have been completed before the bill of lading was given," citing

The *Duero*, L. R., 2 A. & E., 393.
Pyman v. *Burt*, 1 Cab. & E., 207.
Norman v. *Bennington*, 25 Q. B. D., 475, 478.
Nottebohn v. *Richter*, 18 Q. B. D., 63.

In the last cited case Lord Justice LINDLEY said (p. 66):

"But we must not look only at the grammatical construction; and the proper way to treat the matter is that the exceptions apply to all the risks which the shipowner takes."

In *Norman* v. *Bennington*, A. L. SMITH, *J.* (p. 477), said:

"In this bill of lading, the shipowner has exempted himself from damage to the shipper's goods, by reason of rain or of contact with other goods. This is not disputed, but the shipper contended that this exception does not apply, first, to damage done before the voyage has actually commenced. * * * As regards the first point, I do not agree with it. In my judgment, when once a shipowner has received a shipper's goods on board, and has, by his captain, given a bill of lading in the ordinary form for them, he is bound to deliver them at the port of discharge in the like good order and condition as when shipped, except he is exempted by exemptions contained in the bill of lading, and it is immaterial when the voyage in fact commenced. * * * In my judgment, the shipowner, under this bill of lading, is *prima facie* exempted from liability for damage by rain or by contact with other goods after the goods have been shipped, whether the ship had started on her voyage or not."

This accords with the principle laid down by Lord Halsbury in *Hamilton* v. *Pandorf*, 12 App. Cas., 518, 524, that it is the duty of the Court "if it is possible, to give effect to all the words that the parties have used to express what this bargain is."

It is quite plain from these cases that under English law the exception of "latent defects" would relate back to and include those existing at the time of shipment. As the scope of the exception is a matter touching its validity or

invalidity as an exemption from the damage here sued for, that point should be determined by reference to the English law; so that if our own law, under the *Caledonia* rule, would be different (which is not admitted as applied to the clause here in question) it need not be followed.

The argument based on cargo's need of an absolutely seaworthy ship in order to validate its insurance is useful in working out a rule as to whether, on principle, and in the absence of contractual exemptions a shipowner ought to be deemed to warrant against latent defects; but on the point whether for a reduced freight he shall be permitted to obtain a modification of the warranty by contract it has no bearing. For the amount saved by the reduction in the freight rate, insurance on the necessary terms no doubt would be easily procurable. Cases are rare, if there be any at all, in which an insurer has established a defense under a policy where the alleged unseaworthiness consisted in a latent defect in the vessel. Whether, since the passage of the Harter Act, which modifies the shipowner's obligation of seaworthiness by statute, the rule would still obtain that the ship must be absolutely seaworthy as against latent defects in order that a policy of insurance should attach to the risk, *quaere*.

II.

The exception of "latent defects," viewed as a qualification of the implied warranty of seaworthiness, is not unlawful as opposed to Section 2 of the Harter Act.

It is contended by the appellants that if the exception of "latent defects" modifies the warrant of seaworthiness, it is violative of Section 2 of the Harter Act (27 Stat., 445), and hence should be declared void and inoperative.

This contention, it will be observed, assumes that the clause *does* modify the absoluteness of the warrant of seaworthiness as applied to latent defects.

It is based upon some difference in the phraseology of the first, second and fourth sections from that of the third.

The first section provides that it shall not be lawful for the owner, &c., of "any vessel transporting merchandise or property *from or between ports of the United States and foreign ports*" to insert in any bill of lading, or shipping document, any clause designed to relieve the shipowner from liability for negligence "in proper loading, stowage, custody, care or proper delivery" of the merchandise. It further provides that all such clauses shall be null and void and of no effect.

Section 2 provides that it shall not be lawful for "any vessel transporting merchandise or property *from or between ports of the United States of America and foreign ports*," her owner, &c., to insert in any bill of lading or shipping document, any covenant or agreement "whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo, and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

The third section provides more broadly "that if the owner of any vessel transporting merchandise or property *to or from any port in the United States of America*, shall exercise due diligence to make the said vessel in all respects seaworthy, &c., neither the vessel, her owner or owners, agents or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said

vessel, nor shall the vessel, her owner or owners, charterers, agents or master, be held liable for losses arising from dangers of the sea or other navigable waters," &c., nor for deviation in rendering salvage services.

Section 4 goes back again to the phraseology of sections 1 and 2. It provides that it shall be the duty of the owner or owners, master or agents "of any vessel transporting merchandise or property *from or between ports of the United States and foreign ports*, to issue to shippers of any lawful merchandise, a bill of lading" containing marks, numbers of packages, quantity, &c, stating whether it is carrier's or shipper's weight.

Section 5 provides "that for a violation of any of the provisions of this act, the owner or master of the vessel, guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding $2,000."

From the difference of phraseology employed in these sections it seems that the first, second and fourth sections would be limited in application to cases where the bill of lading is issued in this country. A violation of either of those sections entails a fine, and it is a familiar law that the penal laws of one country have no extra territorial force, and cannot affect the rights of citizens of another (*Wharton, Conflict of Laws*, Sections 4, 108, 883).

There is nothing in the statute showing an intent to make either of the acts prohibited by the first, second and fourth sections of the statute unlawful if committed abroad, or that a bill of lading, which contained provisions contrary to sections 1, 2 and 4, if lawful where made, should not be sustained and enforced in the Courts of the United States.

This view is confirmed by the phraseology of the third section, which in terms provides that if the owner of the vessel has exercised due diligence to make her seaworthy,

he shall not be liable in certain specified cases and for certain specified kinds of damage, although such losses may have been contributed to by actual unseaworthiness of the vessel (see Point IV., p. 31).

But, assuming the second section of the act applies to vessels inward bound, does it render an exception against "latent defects" invalid, viewing such exception as a qualification of the warranty of seaworthiness?

This section, as introduced by Mr. Harter, and finally passed, is shown in the subjoined parallel.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver same shall in any wise be lessened, weakened, or avoided.	SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence to* properly equip, man, provision, and outfit said vessel, and *to* make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver same shall in any wise be lessened, weakened, or avoided.
[NOTE.—The parts in italics were struck out by amendment.]	[NOTE—The parts in italics were inserted by Senate amendments.]

It would seem from these changes that the design of Congress was simply to prohibit the insertion of a clause relieving a shipowner from the duty of using *due dili-*

gence to make the vessel seaworthy. In other words, "the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision and outfit said vessel and to make said vessel seaworthy" are made *statutory obligations;* and it is then provided that no contract shall be lawful by which those specifically defined obligations are sought to be "lessened, weakened or avoided."

That incidentally the obligations in regard to seaworthiness, as thus defined by statute, are not quite so stringent as formerly, in that due diligence is substituted for the absolute warranty, is probably due to Senator Frye's vigilance in looking after the rights of American shipowners and to an appreciation by Congress of the inherent injustice of the former rule of seaworthiness as applied to latent defects.

In Germany the harshness of such a rule led to the introduction of a provision in the Commercial Code, § 607, that "loss and injury arising from a defective condition of the vessel, which, in spite of all possible caution, could not be discovered, are to be considered as loss and injury by the act of God." The legislation of the Harter Act is thus directly in line with the previous legislation of Germany.

In the recent case of the *Millie R. Bohannon* (64 Fed. R., 883), Judge BROWN, dealing with the scope and evident purpose of the statute, said:

"The design of the Harter Act was, I have no doubt, to relieve the carrying vessel from her previous responsibility as insurer against latent defects; and to limit her liability as respects her seaworthiness to the obligations of 'due diligence' to make the ship seaworthy."

The conclusion is that the exemption is not unlawful by our law and, therefore, is to be expounded and enforced according to English law.

III.

If the damage was caused by the negligent filling of the tank at sea, and not by a latent defect in the rivet, the loss was within the exception of "loss or damage * * * any act, neglect or default whatsoever of pilots, master or crew in the management or navigation of the ship * * * and all and every other dangers and accidents of the seas, rivers or steam navigation" which is valid by the law to be applied.

Damage caused by sea water entering the hold through the ballast tank is a loss by a danger and accident of the sea. These words in a bill of lading have the same meaning as in a policy. The only difference between the cases is that the carrier may be disentitled to the benefit of the exception if his negligence contributed to the loss (unless he has an exemption from negligence), but that will not affect the point that the loss is a loss by a danger of the seas.

The *Xantho*, 12 App. Cas., 503.
Hamilton v. *Pandorf*, 12 App. Cas., ~~503~~.
The *G. R. Booth*, 64 Fed., 878.
The *Southgate*, 1893 Prob., 329.

In *Hamilton* v. *Pandorf*, which has been repeatedly cited with apparent approval by the Supreme Court, damage to cargo by sea water entering the ship through a hole gnawed by a rat in a lead pipe was held a loss by a danger of navigation within the exception of a bill of lading. Here the sea water came through the tank.

In the present case negligence cannot disentitle the ship to the benefit of the exception, because the negligence of

the officers and crew is also specifically excepted, and it is conceded the contract is valid by English law.

The case as before argued is one for the application of English law. The fact that negligence exemptions were formerly not tolerated under our law is unimportant, since faults or errors in navigation are now excused by statute, if the owner is personally without fault and has used due diligence to make the ship seaworthy. (See Point IV.) Here he was without fault and such diligence was used in this case.

IV.

Exemption from responsibility for this loss is afforded by the 3d Section of the Harter Act.

This section (27 St. at Large, C. 105, Sec. 3, p. 445) as introduced and as it passed with amendments is shown in the subjoined parallel:

H. R. 9176 (52d Congress, 2d Sess.)	As Amended, Passed and Approved, Feb. 13, 1893.
"AN ACT RELATING TO *Contracts of Common Carriers* AND TO CERTAIN OBLIGATIONS, DUTIES AND RIGHTS IN CONNECTION WITH THE CARRIAGE OF PROPERTY.	"AN ACT *relating to Navigation of Vessels, Bills of Lading* AND TO CERTAIN OBLIGATIONS, DUTIES AND RIGHTS IN CONNECTION WITH THE CARRIAGE OF PROPERTY.
"SEC. 3. That if any vessel transporting merchandise or property *between ports* in the United States of America *and foreign ports* shall *on starting on her voyage, be* in all respects	"SEC 3. That if *the owner of* any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in

seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery,* nor shall the owner or owners, *the vessel,* or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such services.*"

[NOTE.—The words printed in italics were struck out by Senate amendments.]

all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel, nor shall the *vessel, her* owner or owners, *charterers, agent,* or master be held liable for losses arising from dangers of the sea *or other navigable waters,* acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*"

[NOTE.—The words in italics were inserted by Senate amendments.]

This section provides as clearly as words can that if the owner of any vessel transporting merchandise *to or from* the United States shall exercise due diligence to make her seaworthy and have her properly manned, neither he nor the vessel shall be liable for losses resulting from faults or errors in the management or navigation of the vessel, or arising from dangers of the sea. Is not this loss plainly within in the statute?

1. The *Carib Prince* was transporting merchandise to the United States. She was a British vessel, it is true, but there is not a word in the statute which limits it to domestic vessels. Clearly a British vessel loading here would be subject to the penalties of the 5th section. Many of our navigation acts have often been held to apply to foreign vessels (*e. g.*, The *Strathairly*, 124 U. S., 558; The *Scotland*, 105 U. S., 24, 30; The *Etona*, 64 Fed., 880, 882). The analogy of the application of the limited liability acts is perfect.

2. Her owners had used due diligence to make her seaworthy. The only unseaworthiness charged relates to the rivet and the rivet holes, and the floors over the bilges; charges of improper construction (fols. 488, 489). Libelants' own evidence shows that when the rivet was in, the alleged defects in it and in the holes were both latent and undiscoverable (fol. 133). No amount of diligence could have availed to detect them.

The utmost diligence was used by the owners to have the vessel rightly built, and by the builders to have this particular bulkhead rightly erected and soundly riveted. The specifications for the vessel generally and for the riveting, bulkheads and water testing were elaborate and stringent (fols. 463-468), and were in excess of Lloyds' requirements (fols. 237, 240, 241). The vessel was built in accordance with them (fols. 250, 236, 184) by builders of good standing (fol. 39) at a cost considerably in excess of that of an ordinary steamer of her class (fol. 413).

The builders obtained and used the rivets most widely used in England (fol. 120). Not every one indeed, but some, were tested by bending them cold, and flattening them cold to be satisfied of their quality (fols. 171, 172). The rivet holes were spaced according to Lloyds' rules for watertight work (fol. 175), five and one-quarter inches from

centre to centre (fol. 190). Wherever the holes in the plates were not perfectly fair they were rimed out with a rimer (fols. 180, 198, 215, 230, 246), until they were fair and then a larger rivet was inserted—a $\frac{7}{8}$-inch one, instead of a $\frac{3}{4}$ one (fol. 199). The drift pin of which appellants make much ado on the ignorant supposition of Quinn, was not used in any such way nor for any such purpose as he alleged. "It is put through to clean the hole when necessary. It is put in oily waste and put through to see that the thing is perfectly clear" (fols. 194, 193, 178, 212, 243-4). The men who did the riveting in this tank were specially selected for their skill in water-tight work, some of them of thirty years' experience (fols. 186, 208, 220, 236). Their work was supervised generally by one of the builders (fol. 170); immediately by a foreman riveter of 18 years experience (fols. 184–192); by the owners' inspecting surveyor, who was at the ship about three hours a day (fols. 204–210); by a Lloyds' surveyor (fol. 220), who was there nearly every day and saw much of the riveting (fols. 224, 225), and by the owners' architect (fol. 235), who visited the ship two or three times a week (fol. 242) after the rivets were headed up. Every rivet on the bulkhead was tested with a hammer by the builders' foreman (fol. 187), and in the same way by the owners' inspector (fol. 206); and nearly every rivet was subjected to the like test by Lloyds' surveyor (fol. 221). This test would have detected any crystallization of iron in a rivet from too much hammering; but no such rivet was found (fol. 197). The bulkhead was then twice tested with the water test in presence of Lloyds' surveyor (fols 222, 187, 188, 173, 206, 207, 237). The tank was filled to about a foot above the main deck, and a pressure of 96$\frac{3}{4}$ tons exerted against the bulkhead, in excess of Lloyds' requirements (fol. 237); the vessel was then lying on an incline of $\frac{3}{8}$ of an inch to the foot

or above ten feet by the stern (fol. 206). The bulkhead showed no signs of weakness or leaking (fol. 238). After the only occasion when the tank bulkhead possibly might have been strained (in the August hurricane) the engineer went down inside the tank and examined the rivets on the bulkhead for over an hour, to see whether there had been any starting or strain; there was no evidence of any; even the cement coating on the bulkhead showed no sign of having started (fols. 130, 135-138).

On this showing, it would seem the owners had at the least used due diligence to have the bulkhead seaworthy.

Now, as to the flooring on the bilges. It is claimed the limber boards were water-tight, so that the water which entered the hold could not get out again; but this is unsupported by any evidence. The carpenter (fols. 327, 332) said the limber boards were not water tight; that when he got down to them he heard the water gurgling, and going down ; that he bored auger holes to give added facilities for the escape of large accumulations of water. The ends might have been tight on arrival in New York without the boards being water-tight all along the limbers, or anywhere along them. What kept the water in the hold was that the outlets of the limbers leading to the engine-room were closed as usual during the night (fols. 321, 322, 287, 288), and the water accumulated between the usual times of sounding the holds in the evening and morning (fols. 321, 323-326).

On the evidence there was no unseaworthiness as to the limber boards. They were right enough, and loose enough; nobody says the limbers were not full when the water was found in the hold. Anyhow, limbers are not fitted with the expectation that water is to drain through them. They are to keep cargo clear of the limbers, and are not

built with reference to unexpected incursions of the sea. They were put down by competent builders; due diligence was used by the owners to have them right; there is no proof they were not right; there is proof that they were right.

Due diligence had been used in selecting the officers and crew (fols. 414, 416).

What more could the obligations of due diligence possibly require of an owner.

3. If the Court is of opinion that filling this tank at sea, with the "ship rolling" (Engr.'s Log, Apostles, p. 162), without stopping or changing her course, was improper, and was the cause of the rivet giving way (see *ante*, pp. 10–13), such act was "a fault or error in the management or navigation of the vessel" within the meaning of the statute.

Faults or errors in navigation are not limited to neglect in shaping the ship's course. In England it has been held that leaving open a sea cock (*Good* v. *London Assn.*, L. R., 6 C. P., 563), or leaving a cargo port insufficiently fastened on sailing (*Carmichael* v. *Liverpool Assn.*, 19 Q. B. D., 242), or omitting to have the rudder pin fastened with a proper pin are matters of improper navigation and improper navigation in the ordinary sense of those words (per Lord ESHER in *Canada* v. *British Assn.*, 23 Q. B. D., 342, 343); they should have the same meaning in a bill of lading or a statute as in a policy (The *Xantho*, 12 App. Cas., 503, 513).

The vessel was in the same trim (*i. e.*, two feet by the stern) when she sailed as when the tank was filled. If that was a wrong trim it was an error or fault "in the management of the vessel" not to have filled it at Granada (23 Q. B. D., at p. 729), which probably occasioned the damage; since, if the tank had been filled there, either it

would not have given way, or, if it had, the damage would have been averted by a prompter draining off of the water.

If the damage be ascribable to any neglect on the part of those in charge of the vessel to discover its presence in the No. 1 hold more promptly, and to draw it off by opening the sluiceways and starting the pumps immediately, such negligence was plainly a fault in the management or navigation of the vessel.

4. The loss arose from a "danger of the sea" within the statute, that is from a wetting of the cargo due to an incursion of sea water.

This would plainly be a loss by a danger of the sea within a similar exception in a bill of lading (see cases cited, *ante*, Point III., p. 30, and *Transportation Co.* v. *Downer*, 11 Wall., 129, 133; *Davidson* v. *Bernaud*, L. R., 4 C. P., 119; *Lowry* v. *Douglass*, 15 M. & W., 745). The further question would then arise, under a bill of lading, whether unseaworthiness or negligence contributing to the loss, prevents the carrier from enjoying the benefit of the exception (*Liverpool* v. *Phenix*, 129 U. S., 397, 438; The *Edwin I. Morrison*, 153 U. S., 199). The test to be applied in deciding whether a given loss is a loss by a peril of the sea is to inquire whether it would have been such a loss within a policy on goods shipped upon a seaworthy ship. If so, it is such a loss within the meaning of the words "danger of the seas" wherever found (The *Xantho*, 12 App. Cas., 503). It is none the less a loss by a danger of the sea, because such losses are now exempted from a carrier's liability by statute. The words "danger of the seas" in the statute, should be construed and given precisely the same effect as when found in the form of an exception contained in a bill of lading.

The ship is not disentitled to the exemption by reason of unseaworthiness, because all this section requires is the exercise of due diligence to make the ship seaworthy, which plainly was exercised, nor by reason of negligence contributory to the loss, because the only negligence in the case, if any, relates to the way the tank was filled or the omission to remove the water more promptly, and if there was any fault about those matters it was a fault in navigation or in the management of the ship, and hence specifically exempted.

The application of this statute is not barred by the charter-party, since libelants are in no way in privity with the covenants there made between the shipowner and charterer. The bills of lading make no reference to it. So far as appears they were ignorant of its existence until put in evidence for another purpose.

The case of *New Jersey Steam Nav. Co.* v. *Mechanics' Bank*, 6 How., 378, is not authority for the point to which it is cited. It simply holds that a principal may be sued on a contract made for him in the name of his agent.

Nor is the right to claim its protection affected by the omission to refer to it by name in the answer. The exercise of due diligence was pleaded. The Court must notice and apply the statute as a part of the law of the land. Statutory exemptions are implied in all contracts, hence are not required to be specifically pleaded, like statutes which simply affect the remedy.

Carver Carriage by Sea, Sec. 76.

Backsondale v. *Great Eastern Ry.*, L. R., 4 Q. B., 244, 255.

The conclusion is that exemption from responsibility for libelants' loss is afforded by the statute, and that the ship-

owner performed the conditions which make it applicable and enforceable.

VI.

The decrees appealed from should be affirmed, with costs.

APRIL, 1895.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for *Carib Prince*, Appellee.

J. PARKER KIRLIN,
Advocate.

No 286 45.

Brief of Kirlin for Appellee

JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES

Filed April 23, 1897.

October Term, 1896. No. 286

JOSEPHINE W. WUPPERMANN,
Libelant-Appellant

against

THE STEAMSHIP CARIB PRINCE,
JAMES KNOTT
Claimant-Appellee

ON CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CARIB PRINCE

CONVERS & KIRLIN
Proctors for Claimant-Appellee

J. PARKER KIRLIN
Advocate

Supreme Court of the United States,

OCTOBER TERM, 1896. No. 286.

JOSEPHINE W. WUPPERMANN,
Libelant, Appellant,

AGAINST

The Steamship CARIB PRINCE, JAMES KNOTT,
Claimant, Appellee.

BRIEF FOR APPELLEE.

This action was brought into this Court by a writ of *certiorari*, issued October 23, 1895 (p. 215), to review a judgment of the United States Circuit Court of Appeals, for the Second Circuit (WALLACE, LACOMBE and SHIPMAN, *JJ.*), rendered June 5, 1895 (p. 216), which affirmed a final decree of the District Court for the Eastern District of of New York, entered October 11, 1894, dismissing the libel herein, with costs (p. 169).

The libel alleged (p. 2):

"That on or about the 31st of August, 1893, there was shipped upon the steamship Carib Prince, then lying in the Gulf of Paria, and bound for the port of New York, and engaged in business as a common carrier, by Doctor T. G. B. Siegert & Sons, five hundred cases Angostura Bitters, the property of your libelant, to be carried to the port of New York, and there delivered unto your libelant in the like good order as received, for a freight agreed to

be paid therefor, and the agents of said steamship signed bills of lading therefor, dated the 31st of August, 1893, *whereby* they acknowledged the receipt of said 500 cases in good order and well conditioned, and *undertook to deliver* the same at the port of New York in like good order."

This bill of lading was subsequently introduced by the claimant (pp. 145, 146, 147).

The libel further alleged that the cases were not delivered in the like good order as received, to the libelant's damage in the sum of $1,500 (fol. 6). *No charge of unseaworthiness nor of negligence was stated.*

A claim was duly filed by Ernest C. Legge, master of the vessel, in behalf of James Knott, the owner (fol. 2), and on the 13th of March, 1894, Mr. Knott filed an answer to the libel, joining issue on the allegations of the libel, and further claiming the benefit of certain exceptions in the bills of lading:

"SIXTH: For a further defense, the claimant avers that the bills of lading under which the merchandise in question is alleged to have been carried, provided that the merchandise in question was 'to be delivered from the ship's deck, " 'where the ship's responsibility shall cease, in the like good manner and well conditioned, at the aforesaid port of New York; the act of God * * * loss or damage from heat or fire on board, in hulk or craft, or on shore, explosion, steam, *accidents to or latent defects in hull, tackle, boilers and machinery, or their appurtenances*, jettison, barratry, any act, neglect or default whatsoever, of pilots, masters or crew, in the management or navigation of the ship * * * and all and every other dangers and accidents of the seas, rivers or steam navigation, of whatever nature or kind, always excepted * * * weight, measure, quality, contents and value unknown, and not accountable for inaccurate description of goods shipped, for leakage, breakage or insufficiency in packing, or in strength of package, obliteration of or inaccuracies of marks, numbers, designation or address on the packages, nor for damages or loss from vermin, sweating, decay, heat of holds, contact with or smell or evaporation from other goods; *nor for any consequences arising from any of the foregoing exceptions.*' That the owner and charterer of said vessel used all due diligence to have her properly equipped, manned, provisioned and outfitted, and in every way seaworthy and capable of performing her intended voyage, and used

all due diligence in and about the transportation of the merchandise in question, and allege that if the cargo mentioned in the libel was damaged as alleged, the damage was due to latent defects in certain rivets, angle irons, braces and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage, as will more fully appear on the trial of this cause. The claimant further alleges that each and all of the above mentioned exemptions in the bill of lading are valid by the law of England which prevails at the port where said merchandise is claimed to have been shipped, and where the said bills of lading are alleged to have been issued."

Three other libels were filed at about the same time for similar damage (pp. 174, 190, 200); all were heard together in the District Court and in the Circuit Court of Appeals (pp. 6, 211), where they are still pending. The aggregate damages claimed in all the libels was $5,179.79.

At the opening of the trial in the District Court, the following admissions were made (fol. 19):

"It is admitted that the cargo was on board, and bills of lading were given. It is admitted that *under the English law, the language of the bill of lading made a valid contract.*"

The damage to libelant's cases of bitters was caused by the escape of sea water from the peak ballast tank into the adjoining or No. 1 hold, owing to the giving way of a three-quarter inch rivet in the peak bulkhead. The accident happened on September 4th or 5th, 1893, on the high seas.

The Carib Prince was an iron and steel steamer of 1,304 tons net register, 300 feet long, and fitted for the carriage of passengers and freight. She was a new vessel, having been in commission only about three months before the accident (fol. 20). Ballast tanks were arranged in the bottom of all the holds, extending nearly to the ship's sides. The perpendicular sides of the ballast tanks and the curved sides of the ship formed a triangular space or canal about eighteen inches in width, into which water

entering the hold would flow. These spaces are called bilges. A pipe line led from the after end of the bilges on each side of the No. 1 hold to the engine-room. Sluice doors on the various bulkheads between the No. 1 hold and the engine-room compartment 'midships connected the bilges in the different holds along the sides of the ballast tanks, forming a kind of channel which also led to the engine-room. For purposes of safety, both the pipe line and the sluice doors were usually kept shut at sea (fols. 288, 330), being opened only to relieve the bilge water, when found there by means of the sounding pipes. A wooden ceiling was laid on top of the ballast tank in the No. 1 hold, and over the top of the bilges, making a continuous floor from side to side of the ship.

The steamer was also fitted with a peak ballast tank, triangular in shape, extending from the bottom of the ship to the between-deck. The sides of this were the sides of the ship; the after end of it was the collision bulkheads. It was twenty-four feet deep, and had a capacity of eighty-three tons of water. The angle irons, beams, strengthening bars, &c., which enabled the collision bulkhead to sustain the strain of the water against it, were on the inside of the tank, the face of the bulkhead showing in the No. 1 hold being smooth, except that the plates were lap-jointed.

The rivet which gave way was in the collision bulkhead, about two feet from the port side of the ship, and about three feet above the floor of the No. 1 hold. It was one of a series running horizontally across the bulkhead, by which a knee tie or strengthening brace which led a short distance across the bulkhead on the inside of the tank, and also along the side of the ship, was fastened. The shape of the knee tie is shown on the blue print (p. 144), by the letters "A" "B" on the port side. The rivet which broke was the one on the bulkhead at the 'midship end of the break. Only one rivet gave way (fol. 150); only one rivet head was off (fols. 37, 38, 48, 49, 51, 69, 71, 114, 115, 118, 121, 141, 150, 267, 269), although some of the others were strained so as to be weeping, that is, showing dampness (fol. 407) around them (fols. 140, 151) on the starboard side (fol. 271).

On leaving Trinidad, the steamer was trimmed two feet by the stern, her draft being 14 feet 10 forward and 16 feet 10 aft (fol. 284). On September 3d, to make the steamer "go easier—steam better" (fol. 304), the peak tank was pumped full of water. Soundings were taken both in the tank and in the No. 1 hold, during the process of filling the tank, but no leaking was discovered (fol. 335). On the following morning (fols. 32, 47, 323, 326), the sounding of the tank disclosed that the water had fallen in it; and on sounding the No. 1 hold, an accumulation of water was found there (fol. 282). The fore hatches were immediately removed, and on going below the chief officer found water coming through a rivet hole on the port side of the bulkhead, about two feet from the ship's side, and three feet above the floor. The hole was near the level of the cargo, which only partially filled the lower hold; it was immediately plugged. The officer then picked up from a bag lying immediately beneath the hole the head or outer end of a broken rivet; this showed a clear break; the appearance of the iron was fair (fols. 307, 308); the cargo was at once moved away from the sides of the ship, and holes were made in the limber boards to permit a freer flow of water to the bilges, and the pumps were at once started both upon the ballast tank and upon the No. 1 hold, both being cleared as quickly as possible. The remainder of the voyage was made without the use of any ballast forward.

It was contended in the Courts below and is argued here that the vessel was unseaworthy in two particulars: (1) in that one of the rivets of the bulkhead between the peak tank and the No. 1 hold was defective, (*a*) because the metal of the rivet was crystallized and weakened by too much hammering when originally headed up, and (*b*) because it was weakened by being put through holes which were untrue; and (2) in that the limber boards over the bilges were too tight. These charges of unseaworthiness were considered below although no allegations of unseaworthiness are to be found in the libel.

Both the District Court and the Court of Appeals found that all possible deligence had been used by the owners to make the ship in all respects seaworthy, and to have the

riveting sound and secure; that the cause of the rivet giving way was a latent weakness in it, due to the crystalline character of the iron, caused by an excess of hammering in the original riveting while the rivet was cooling off; that this weakness constituted a latent undiscoverable defect in the rivet, and that the loss and damage caused by the rivet giving way and letting the water out of the tank on to the cargo was within an exception in the bill of lading of "accidents to, or latent defects in, hull, tackle, boilers and machinery or their appurtenances."

Both courts found against the libelant on the other two contentions: (*a*) that the rivet was defective by reason of the holes being untrue, and (*b*) that the ship was unseaworthy because the limber boards were too tight. The suggestion of the present counsel (Appellant's Brief, p. 6) that "the courts below apparently passed this over in their examination of the facts" cannot be accepted, as both the points were elaborately argued in both the courts below by the late Mr. George A. Black, who appeared in both the lower courts in behalf of the appellant.

After the adverse decision of the Court of Appeals the libelant sued out this writ.

ARGUMENT.

The points which will be submitted in this brief, in support of the decision reached below, are:

(1.) Libelant's contractual rights are to be determined from the bill of lading; that she is not in privity with the charter-party under which the vessel at the time was hired out by the owner to the Trinidad Line (p. 7).

(2.) That the bill of lading is to be construed in accordance with English law (p. 9).

(3.) That the ship was not unseaworthy, either because of inequality in the strength of one rivet in the collision bulkhead which formed the after end of the peak tank, or because of alleged tightness of the limber boards (p. 10).

(4.) The loss is within the exception in the bill of lading, of "accidents to the hull, tackle, boilers and machinery, or their appurtenances" (p. 21).

(5.) That the loss is within the exception of "latent defects in hull * * * and machinery or their appurtenances" (p. 28).

(6.) That the introduction of such an exception is not prohibited by the second section of the Harter Act (p. 42).

(7.) The ship is relieved from liability for latent defects by the provisions of the Harter Act (p. 47).

(8.) If the loss was caused or contributed to by the negligence of those in charge of the steamer, in the mode of filling the tank, or of taking soundings, or of omissions to sound, such negligence was "in the management or navigation of the ship," within the meaning of third section of the Harter Act, which absolves the ship from all liability therefor (p. 50).

POINTS.

I.

THE CHARTER-PARTY BETWEEN JAMES KNOTT, OWNER, AND GEORGE CHRISTALL, CHARTERER OF THE VESSEL, HAS NO BEARING UPON THIS CASE. THE LIBELANT WAS NOT IN PRIVITY WITH IT AND OBTAINED NO RIGHTS UNDER ANY OF ITS STIPULATIONS. HER CONTRACTUAL RIGHTS ARE DEFINED IN AND ARISE UNDER THE BILL OF LADING.

A year prior to this voyage the claimant had chartered the Carib Prince to George Christall, of the Trinidad Direct Line Steamship Company, for the period of four years (p. 148). The steamer was engaged under that charter at the time of the accident. It vested the entire possession and control of the vessel in Christall, who operated her with his own servants and at his own expense. It was a demise charter. (*Scrutton on Charter Parties*, pp. 1-3; *Baumvoll* v. *Gilchrist*, 1892, 1 Q. B. D., 258;

Baumvoll v. *Furness*, 1893, App. Case, 8; *Meiklereid* v. *West*, 1 Q. B. D., 428; *U. S.* v. *Shea*, 152 U. S., 178; *Freed* v. *U. S.*, 11 Wall., 591; *Hooe* v. *Groverman*, 1 Cranch., 214; *Marcardier* v. *Insurance Co.*, 8 Cranch., 39; *Bramble* v. *Culmer*, 78 Fed. Rep., 497.)

Notwithstanding such a demise of the vessel, it has been held that she is liable *in rem* for the breach of a contract of carriage made for her by the charterer (*Schr. Freeman* v. *Buckingham*, 18 How., 182).

Libelant's bill of lading was issued by Christall (fol. 434). She declared on this contract in her libel (fol. 5), apparently on the theory that it bound the ship *in rem*, although not purporting to be issued by the master (The *Centurion*, 57 Fed., 412, 416). She alleged that the steamship was "engaged in business as a common carrier" at the time of the shipment (fol. 5). That allegation is inconsistent with the contention now put forward, that the goods were shipped upon a demised ship, under a charter-party containing an express warrant of seaworthiness, with which she seems to claim a relation of privity. Her rights, and the steamer's obligations to her, are to be determined from the bill of lading (*Iron Mountain Ry.* v. *Knight*, 122 U. S., 79, 92; *N. J. St. Nav. Co.* v. *Merchants' Bank*, 6 Howard, 344). She is not in privity with the charter or any of its stipulations; nor is she in position to claim any larger rights as against the steamer than she would have against the charterer with whom she contracted, on the terms, conditions and exceptions stated in the bill of lading.

It is alleged that the merchandise in question was libelant's property at the time of shipment (fol. 5). If this be true, the shipper was her agent for the purpose of shipment and to make the contract. It is presumed he had authority to make it in the form adopted (*Zimmer* v. *N. J. Central Ry.*, 137 N. Y., 460, 463; *Jennings* v. *Grand Trunk Ry.*, 127 N. Y., 438, 446); but no question can arise on this point, since the libelant adopted the contract and declared on it in her libel (fol. 5).

Moreover, this charter-party is not in evidence except for a qualified purpose. The libelant had examined as witnesses Ernest C. Legge, master, and Edward

Keeys, engineer, and certain entries of the engineer's log book had been put in evidence by the libelant (p. 43). The claimant thereupon proved that the officers and engineers of the ship were not servants of the shipowner (fol. 256), and offered in evidence the charter-party, "for the purpose of showing that it is only a charter of the bare ship and that all of the members of the crew and officers are servants of the charterer, not of the shipowner" (fol. 257). It was not introduced by the claimant for the purpose of varying, in any way, the contract between the libelant and the ship, as agreed in the terms of the bill of lading (p. 145). The bill of lading made no reference whatever to the charter-party.

II.

THE BILL OF LADING SHOULD BE CONSTRUED BY ENGLISH LAW.

The contract of carriage declared on in the libel (fol. 5) was signed at Trinidad (fol. 434), a British possession, for the transportation of goods upon a British steamer. The damage occurred on the high seas, in an early stage of the voyage. In these circumstances the contractual rights and obligations of the parties, under the bill of lading, are to be determined according to English law (*Liverpool St. Nav. Co.* v. *Phœnix Ins. Co.*, 129 U. S., 397; *Fonseca* v. *Cunard S. S. Co.*, 153 Mass., 553).

By a stipulation entered into on the trial in the District Court (fol. 19), "it is admitted that under the English law, the language of the bill of lading made a valid contract."

III.

THE STEAMER WAS NOT UNSEAWORTHY, NOR DID ANY PERSONAL NEGLIGENCE OF THE OWNERS CONTRIBUTE TO THE LOSS.

1. *Character and construction of the vessel.*

The Carib Prince was substantially a new vessel. She was built to order for Mr. George Christall, who operates a line of steamers, known as *The Trinidad Line*, from New York to Trinidad, in June, 1893 (fols. 437, 20), three months before this accident. She was an all steel steamer, of 1,304 tons net register, and of 2,500 tons dead weight capacity (fol. 457). She was built by builders of the highest reputation in England, and at an expense considerably in excess of the usual cost of vessels of this class (fol. 413). She was designed to be, and was, an exceptionally fine vessel.

The utmost diligence was used by the owners to have her rightly built, and by the builders to have this particular bulkhead properly erected and soundly riveted. The specifications for the vessel generally and for the riveting, bulkheads and water-testing were very stringent (fols. 463, 468), and were in excess of the requirement of Lloyd's Register (fols. 237, 240, 241). She was built in accordance with these specifications (fols. 250, 236, 184), by builders of good standing (fol. 39), under the supervision of a Lloyds' surveyor, and the owners, architect and surveyor, at a cost considerably in excess of that of an ordinary steamer of her class (fol. 413). The workmanship of the vessel was very good (fol. 156).

The builders obtained and used the rivets most widely used in England (fol. 120). Not every one, indeed, but some of them were tested as to quality by bending them cold and flattening them cold (fols. 171, 172). The rivet holes were spaced according to Lloyds' rules for watertight work (fol. 175), five and a quarter inches from centre to centre (fol. 190). Wherever the holes in the plates were not perfectly fair, they were rimed out with a rimer (fols. 180, 198,

215, 230, 246), until they were fair, and then a larger rivet was inserted, one of seven-eights of an inch instead of three-quarters of an inch diameter (fol. 199). The "drift pin," which libelant's expert Quinn ignorantly supposed was used to stretch five-eighths inch steel plates so as to make untrue holes fair, was not used in any such way, nor for any such purpose. "It is put through to "clean the hole when necessary; it is put in oily waste "and put through to see that the thing is perfectly "clear" (fols. 194, 193, 178, 212, 243-4). The men who did the riveting in this tank were specially selected for their skill in watertight work, and some of them men of thirty years' experience (fols. 186, 208, 220, 236), and their work was supervised generally by one of the builders (fol. 170); immediately, by a foreman riveter of eighteen years' experience (fols. 184, 192); by the owners' inspecting surveyor, who was at the ship about three hours a day (fols. 204-10); by a Lloyds' surveyor (fol. 220), who was there nearly every day and saw much of the riveting done (fols. 224, 225); and by the owners' architect (fol. 235), who visited the ship two or three times a week (fol. 242) and saw the rivets after they were headed up. Every rivet on the bulkhead was tested with a hammer by the foreman riveter (fol. 187) and by the owners' inspector (fol. 206); and nearly every rivet was subjected to the like test by Lloyds' surveyor (fol. 221). This test it is proved and not denied, would have detected any crystalization of iron in a rivet from too much hammering; but on the tests no such rivet was found (fol. 197).

From this undisputed proof it is fairly to be inferred that the rivet broke from undue strain rather than from inherent weakness. The bulkhead was further twice tested with the water test in the presence of Lloyds' surveyor (fols. 222, 187, 188, 173, 206, 207, 237). The tank was filled to about a foot above the main deck, and a pressure of ninety-six and two-thirds tons exerted against the bulkhead, an excess over Lloyds' requirements (fol. 237). The pressure thus exerted on the bulkhead was increased by the fact that the vessel was then lying on an incline of five-eighths of an inch to the foot, or more than ten feet by the stern (fol. 206). The bulkhead under

these tests showed no sign of weakness or of leaks (fol. 238). After the only occasion when the tank bulkhead could possibly have been strained, during a hurricane in the August preceding the accident, the engineer went down inside the tank and examined the rivits on the bulkhead for over an hour to see whether there had been any starting or strain. No evidence of any strain was apparent. The cement coating on the bulkhead showed no sign of having started (fols. 130, 135, 138).

Notwithstanding all these efforts, it is claimed that the iron of the rivet in question had become crystalized by a trifle too much hammering, after it had cooled off. This was testified by *libellants' witness* Keyes:

Q. Are you familiar with qualities of iron, to say whether this rivet is of good quality or not (Claimants' Exhibit 6)? A. I am, sir.

Q. Is it good or not? A. No, sir.

Q. What is its defect, in your judgment? A Inferior iron, short and brittle, without a fibre.

Q. Has that been annealed? A. Yes, sir.

Q. Might not this condition of fibre have been produced by too much hammering when it was annealing? A. Yes, sir.

Q. When a line of rivets are put in in construction they usually work on three at a time, do they not? A. Yes, sir.

Q. And every time they put in a new one they tighten the one behind it, do they not? A. They tighten the second one behind it; yes, sir.

Q. As the iron is cooling, if the second one behind is hammered too much that will produce a crystalline character in the iron, will it not, and will give it the appearance of being short and brittle? A. Yes, sir.

Q. That is the appearance that this had? A. Yes, sir.

Fols. 142-144.

There was no other evidence to this effect; and it is to be noted that this witness did not express the opinion that the rivet was weakened so as to be unfit for its purpose; indeed, he did not say it was weakened at all.

2. *The claim that the rivet holes were untrue was not sustained.*

It was contended in the proof that the rivet holes had not been even when the rivet was inserted, but had apparently been made so by force (fol. 355), although libelant's evidence as to this was not harmonious (fols. 147, 353). One Quinn claimed that if the two holes were out of line $\frac{1}{8}$th of an inch the rivet would lose one third of its strength (fol. 371). Saunders, a witness for claimant, says the irregularity of the holes, if anything, did not exceed $\frac{1}{16}$th of an inch, which would not affect the strength of the rivet at all (fol. 255).

Although libelant's witness Keyes stated the holes in the different plates were not perfectly true, he does not state the extent to which they were out of "fair," nor that this weakened or had anything to do with the giving way of the rivet. On the contrary, his evidence is that it broke from another cause.

Probably what Keyes took for a want of fairness in the holes was only a springing apart of the plate and knee tie when the rivet broke, leaving a space between them, which may have felt like an irregularity in the holes. This rivet was at the midship end of the knee tie. The tank was of triangular shape. The heaviest pressure of the water coming against the midship part of the bulkhead would tend to spring it away from the knee tie on the inside of the tank after the end rivet was gone. This also accounts for the quantity of water that came through the hole, although a part of the rivet remained in it. The part of the rivet which had to be knocked out was probably in the knee tie. No witness says any part of it was seen by him in the bulkhead plate.

This explanation is borne out by the testimony of Saunders, who stated that he put his finger through the holes, in New York, before the bulkhead was repaired, and found them substantially fair (fols. 252 255). Libelant attempted to disparage this evidence by the suggestion that the holes had been cut out at that time; but there is no evidence to that effect. The riming out, if there was any, occurred at the

time the new rivets were put in (fol. 148), but at the time Saunders saw the tank the rivets had not been put in, nor had preparations for putting them in been made (fol. 152). The holes at that time were filled by a bolt with a nut on it, which was taken off for examination (fol. 253).

The evidence of the builders (*ante*, pp. 10, 11) shows that the holes were not untrue. They could not have been. The holes through the plates were $\frac{3}{4}$ inch holes, and the rivets put in were $\frac{3}{4}$ inch rivets. If the holes were not true, the rivets would not have gone in. Wherever the holes were not perfectly true, they were made so by putting in the rimer and riming out the holes until they became true; and a larger rivet was then inserted (fols. 180, 198, 215, 230, 246, 199).

The use of the drift pin was exclusively limited to the purpose of cleaning the holes, in case any dirt or rust may have accumulated in them; that is, before the rivet is put in, the drift pin, bathed in oil, is inserted in the holes (fols. 194, 193, 178, 212, 243-4).

It is self-evident that if the holes had been an eighth of an inch out of line, as suggested by Quinn and Clarke (wooden shipmaster), the use of the drift pin would not have sufficed to stretch a five-eighths of an inch cold steel plate so as to bring one hole fairly over the other. The evidence of the witness Quinn being contrary to common knowledge, in an essential particular, should be received with caution (The *Thomas Melville*, 31 Fed., 486, 487).

Examined by the Court, even Quinn himself admitted that he constantly passed rivets which were not perfectly true as good and fair work (fol. 374). The proof is wholly insufficient to support a finding that the holes were untrue to an extent that materially or substantially affected the strength of the rivet; and both of the courts below have so found.

3. *There was no unseaworthiness with regard to the flooring over the bilges.*

In the appellant's brief only a part of the evidence referring to the tightness of the bilges is referred to. On the

whole of the evidence it is perfectly clear that the timber-boards were not water-tight; that water was passing down through them at the time the carpenter bored the holes; and that the object of boring the holes was not to permit water to find its way to the rose boxes in the bilges from which it had been previously excluded, but was simply an alternative means adopted of letting the water in fast, instead of moving enough of the cargo to permit the limber boards to be raised (fols. 30, 34, 36, 37, 44-5, 326, 327, 332). The evidence in support of this charge of unfitness was too weak to call for notice in the opinion of the Court below.

4. *There was no negligence in failing to inspect the riveting after the August hurricane.*

It appeared from the evidence that on the outward passage towards the West Indies, ten days before this cargo was laden on board, the vessel had passed through a severe hurricane; and the suggestion was made that possibly the rivets may have become strained by the working of the vessel in that storm. The evidence of Keeyes, however, showed that such was not the case; that the rivet had not broken from strain, but from the crystalline character of the iron (fols. 142-144). Nevertheless the experience of the vessel in that storm affords the libelant a text for preaching a sermon upon the duty of minute examination of the rivets of the vessel and of the application of the hammer test to each rivet in every case after a steel steamer has passed through a storm, and for the omission to make such a test in the present case, a charge of negligence and of unseaworthiness is brought forward. Unfortunately for this argument, it appeared that a most careful examination of the particular place where this rivet was located was made by the engineer after the storm. It is true that he did not go down into the tank "for a practical examination," as the libelant points out; but after he got down there, he made it his business to make one. Libelant's own evidence as to this ought to conclude her theory on this point:

Q. Did you make an examination of the interior of the tank (after the hurricane)? A. Not a practical examination. I made an examination just to satisfy myself, to have a look at the formation of the tank principally; it was the first time I had seen it; *I didn't go with the intention of examining whether there was any damage or not, but I made that my business when I was down there.*

Q. Did you examine to see whether there was any damage? A. Yes, sir.

Q. Did you look at the collision bulkhead? A. Yes, sir.

Q. Did you look at the knee tie? A Yes, sir, wherever there were rivets.

Q. Was there any coating or wash on the forward side of the bulkhead? A. Yes, sir, a coating of Portland cement.

Q. Was that over all the rivets? A. The rivets and the bulkhead as well.

Q. Did you notice that any rivets were started on the inside? A. I couldn't tell that any had been started.

Q. Had the cement been started? A. Not that I could see.

Q. You say you examined wherever there were rivets on the inside of the tank? A. Yes, sir.

Q. How long were you down there? A. Upwards of an hour (fols. 130-131).

Q. On what day was it that you went down into this tank first after this storm? A. On the morning of the 22d of August.

Q. The vessel was then at sea? A. Yes, sir.

Q. Did anybody go with you? A. No, sir.

Q. And it was your first visit to the interior of the tank? A. Yes, sir.

Q. How did you get down into it? A. Through a manhole door.

Q. Was there a ladder to go down into it? A. Yes, sir; three ladders.

Q. Inside? A. Inside.

Q. Permanent? A. Permanent ladders.

Q. Did you carry lights with you? A. I did.

Q. In what shape? A. In the shape of a torch and a lantern.

Q. And you say you found it all lined with Portland cement? A. Yes, sir.

Q. How thick was that lining? A. A heavy wash—washed with a solution of cement in paste form.

Q. What would you take that to mean in thickness, a heavy wash? A. It materially differs; depends upon the surface it is put on. Put a coat of cement about one-six-

teenth of an inch thick, and about the rivets would be thicker and clumsier.

Q. You found nothing to indicate any starting of the cement? A. According to appearances.

Q. Well, you saw it and you are telling us what you saw? A. Yes, sir.

Q. Was there cement on all the sides of the tank as well as the bulkhead? A. Yes, sir.

Q. And on the floor of it? A. There is no floor in it.

Q. It comes down to a flat surface on the bulkhead side, doesn't it? A. No, sir; it is wedge shaped at the bottom of the ship.

Q. Was that portion of the tank which formed the bottom of the tank also covered with cement? A. Yes, sir; not only with a wash but with a body of cement.

Q. Was the top of it, which is the underside of the between-decks there, also washed with cement? A. I am not sure of that.

Q. Could you, by means of these ladders, examine every portion of that interior? A. Yes, sir; and without the assistance of the ladders.

Q. Why, part of it is twenty feet high, isn't it? A. Yes; but you have got intermediate stringers that you could stand on.

Q. This particular beam to which this angle iron is attached is inside of this tank? A. Yes, sir.

Q. At what height above the bottom of the tank is that beam? A. From the ship's bottom?

Q. Yes? A. Six feet or more.

Q. Did you look at that beam at all? A. I was on top of it.

Q. Was that also covered with cement? A. Yes, sir.

Q. Was the cement perfect there? A. Apparently (fols. 134–138).

The notion that every rivet on a ship must be tested with a hammer or by water pressure after a storm is certainly novel. After such a test is applied to the rivets when first inserted, it is not supposed that any further hammer tests are necessary. Certainly, nothing in the evidence shows it is ever practiced; nor does the evidence show that it would have been effective in the present case to discover the weakness of this particular rivet. Such a practical matter should not be left to argument; it should be the subject of expert evidence (*Union Ins. Co.* v. *Smith*, 124 U. S., 405; *Eastern Transp. Line* v.

Hope, 95 U. S., 298. The evidence so far as it goes tends to show the contrary. The rivet head, which was picked up by mate Scott, showed that the break across the iron was a fair break (fol. 307), and, as it broke at the bottom of the countersunk part of the head, it is evident it could not have been broken in August and still have stayed on the face of the bulkhead. Its own weight would have caused it to drop out.

The conclusion must, therefore, be that the August hurricane had nothing to do with the accident, which was really caused either by a latent defect in the material of the rivet or by the negligence of the ship's crew in filling the tank at sea, under the circumstances then existing, in the manner adopted.

5. *The alleged brittleness in the metal of one of the rivets in the collision bulkhead, if true, did not amount to unseaworthiness.*

This is not a case where the latent defect became, during the voyage, the cause of the ship's disablement. In this respect it differs from the Caledonia, where the defect in the shaft resulted in the ship becoming helpless. The Carib Prince was seaworthy, in every sense, for the voyage upon which she was bound. She was a practically new steel vessel, a very superior ship for her class, both in design and in the manner in which she was built. She started upon the voyage from Trinidad to New York in the same trim in which she had made the outward voyage from New York to Trinidad, viz., two feet by the stern (fol. 79). Shortly after the outset of the voyage, without previous intention to do so or any present necessity but simply for the purpose of gaining an additional quarter of a mile an hour speed, the master concluded to fill up his peak tank (fols. 79, 80). To save time, he filled it without stopping the ship, and at a time when by reason of cross sea and beam wind, she was rolling. It is proved and not disputed, that this was improper navigation (fols. 397, 398). In consequence of it, one of the rivets in the bulkhead broke, creating a leak, through which water poured upon the libelant's cargo. The break-

ing of the rivet in no way affected the general seaworthiness of the ship. No more water could come into her in consequence of the leak than was already in. The only result of the leak was that a part of the water went from the peak tank into the No. 1 hold upon the libelant's bitters. The ship was in no way imperiled; the water was promptly pumped overboard, both from the peak tank and the No. 1 hold, and the ship proceeded in safety, and at substantially the same speed and trim, on her voyage towards New York.

One witness testified that the metal of the broken rivet showed a brittle or crystalline character, which may have been due to too much hammering in the original riveting as the metal was cooling off. On this proof, both the Courts below have found that the damage resulted from a latent defect in the rivet, and both have said that this defect constituted unseaworthiness (pp. 476, 212). It is not necessary, we submit, to resort either to the doctrine of latent defect, or to unseaworthiness, in the determination of this controversy.

Plainly, it is a great stretch in the use of the term to say that such a trifling defect of construction in one of the partitions of a huge steel hull amounts to unseaworthiness. Seaworthiness in the hull of a vessel requires nothing more than reasonable fitness for the voyage. In *Steel* v. *State Line*, 3 App. Cas., 72, Lord CAIRNS said:

"By 'seaworthy' I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and loaded in that way, may be fairly expected to encounter in crossing the Atlantic."

In *Du Pont de Nemors* v. *Vance* (19 How., 162, 167), Mr. Justice CURTIS defined this obligation as follows:

"To constitute seaworthiness of the hull of a vesssel, in respect to cargo, the hull must be so tight, staunch and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage, without damage to the cargo under deck. If the vessel during the voyage has leaked so much as to injure the cargo * * * one mode of testing seaworthiness is to ascertain what de-

fects occasioning leakage were found in the vessel at the end of the voyage, and then to inquire which of those defects are attributable to perils of the seas encountered during the voyage, and which, if any, existed when it was begun; and if any of the latter be found, the remaining inquiry is whether they were such as to render the *vessel incompetent to resist the ordinary attacks of the sea* in the course of the particular voyage, without damage or loss of cargo."

The specific defects in that case were "two worm holes in her bow about three-eighths of an inch in diameter, one about three streaks from the keel, the other a little higher up" The vessel was new, and the Court found there was no doubt that the worm holes were in the plank when put in the vessel, but for some cause remained undiscovered (p. 167). The ship had also strained and started a butt, owing to perils of the sea. The question before the Court was whether the leak from the worm holes amounted to unseaworthiness so as to deprive the owner of the benefit of the exception of sea perils. On this point the Court (p. 168) held:

"We do not think the existence of the worm holes amounts to unseaworthiness."

In the *Sandfield* (Appendix II., *post*), where the question was whether a rivet in the ship's side, defective because of unequal strength to that of its neighbors, made the ship unseaworthy, BROWN, *J*., said:

"It is likely enough that the cant given to the rivet by "driving it through the overlapping holes, which were "not quite true, and the cant given to the clinch at both "ends, might diminish its endurance by subjecting it to "an unequal strain and increasing the injurious effects of "the vibration of the plates against it. If such was the "fact, *any such mere inequality in the strength of the "rivets does not amount to unseaworthiness*, or a violation "of the provision of the charter that the ship shall be "tight, staunch and strong"

In this case the proof of an act of improper navigation—the filling of the tank while the ship was under headway and rolling—deprives the Court of any means of judging

whether the brittleness of the rivet would have constituted a defect, if the tank had been subjected to only a proper use. An inference of unseaworthiness would only arise from the giving way of the rivet while subjected to the ordinary uses, without the concurrence of another effective cause. On this state of the proofs the presumption of seaworthiness (the *Warren Adams*, 74 F. R., 413, 415) should outweigh the possible inference that the brittleness of the metal in the rivet constituted a defect which might have produced similar results in a proper use of the tank. The mere fact (if a fact) that the rivet was brittle is not enough of itself to condemn it; nor is the fact that it broke. If, although brittle, it was strong enough for proper use (and this is not denied in any of the evidence), the obligation of the owner would be satisfied. The law only requires of a shipowner a vessel reasonably calculated to endure the *ordinary* strain of the navigation in which she is engaged. If his vessel be reasonably sufficient for the voyage he is not to be held liable, although a stouter ship (or rivet) would have outlived the peril (*Maclachlan on Shipping*, p. 459).

6. It is doubtful whether the allegations of unseaworthiness can be considered by the Court, in the absence of allegations in the libel in that behalf (*Lawrence* v. *Minturn*, 17 Howard, 100, 110; *McKinlay* v. *Morrish*, 21 Howard, 343).

IV.

THE CLAIM IS WITHIN THE EXCEPTION OF "LOSS OR DAMAGE FROM * * * [AN] ACCIDENT TO * * * [THE] HULL OR ITS APPURTENANCES" AND THE "ACT, NEGLECT OR DEFAULT * * * OF * * * MASTER OR CREW, IN THE MANAGEMENT OR NAVIGATION OF THE SHIP."

It has been shown that the ship was entirely seaworthy, and in every way fitted for this voyage, without using the peak tank at all. In filling it to bring the vessel's head

down, six or eight inches, and make her steam a little better as he expected -a matter of four or five miles in twenty-four hours—the rivet gave way, and water poured in upon the cargo. The loss is apparently within the language of the exception of "accidents to hull or their appurtenances."

In carrying out his whim of using the tank upon this occasion, the captain filled it at sea without stopping the ship. The evidence is undisputed that this was improper use of the tank and wrong mode of filling it. There is hardly a doubt that the tank broke from the way in which it was filled. The act of filling it in this way, was an "act, neglect or default of the master or crew in the management or navigation of the ship," within the second clause of the exception. Both of these clauses of the bill of lading are valid by English law, which is to be here applied, and the negligent filling of the tank is also covered by the third section of the Harter Act.

(*a.*) It is perfectly clear from the testimony that there was no actual need of filling the peak tank when it was filled at sea. The master, who was not the servant of the shipowner (fols. 256, 439), attempted to justify his use of the tank by saying it was to correct the trim; but from his evidence, the trim was not unusual (fol. 97), and both he and the mate concede that it was filled in the expectation of bringing the ship's head down only six or eight inches, to make a trifling gain in speed.

Mate Scott (fol. 304), said:

"Q. What was the occasion of filling it? A. Because the ship was so much astern, we thought she would go easier—steam better."

Captain Legge (fol. 40) testified:

"Q. How did you come to fill up this tank on the third of September? A. On leaving Grenada, the vessel was three (two) feet by the stern, and proceeding to New York, every day using coal—burning coal—puts her more by the stern.

"Q. It lightens her up forward? A. I considered it absolutely necessary to fill this ballast tank to keep the vessel in trim.

"Q. Had you a cargo on board? A. Yes, sir.

"Q. What was the draft when you left Grenada? A. Fourteen feet ten forward, sixteen feet ten aft.

"Q. Had you had a cargo on the voyage from New York to Trinidad also? A. Yes, sir."

(Page 27). "Q. What was her draft on the voyage down? A. Fifteen feet three forward, seventeen feet four aft (two feet one inch by the stern).

"Q. On the voyage from Trinidad or Grenada to New York, on which this occurrence happened, her draft was fourteen feet ten forward and sixteen feet ten aft before you put the water into the tank? A. Yes, sir.

"Q. When you put the water into the tank, what was her draft? A. We were at sea then, and we could not as certain exactly the draft; that tank ought to tip her six or eight inches.

"Q. When you emptied the tank, you came to New York without anything there? A. Yes, sir.

"Q. You did not shift any cargo? A. No, sir.

"Q. And did not change the trim of the vessel at all? A. I had no other way to do it.

"Q. And you arrived in safety? A. Yes, sir; only she didn't steam as fast; that is the only thing; the runs in the log book will show that.

"Q. Give me the precise hour at which this tank was filled up on the third of September? A. 10 P. M. of the 3d; it was emptied at 6 A. M. of the 5th. The tank was filled for a period of thirty-two hours.

"Q. What was the speed you made while the tank was filled? A. Two hundred and forty-seven miles the first twenty-four hours; the next day's run was two hundred and forty-six miles, an average speed of about ten and a quarter miles.

"Q. What was the speed during the next twenty-four hours? A. Two hundred and forty-one.

"Q. That was when the tank was empty? A. Yes, sir.

(*b.*) It scarcely needs proof to show the imprudence of taking eighty-three tons of water into the peak ballast tank above the level of the cargo, merely for the sake of making a trifling gain in speed. This ballast tank, as its name implies, is designed for use when the ship is empty, not when she carries cargo. The experience of other cases mentioned in Mr. Congdon's evidence, shows that the use of such a ballast tank is hazardous under the most favorable circumstances. The triangular shape

of the tank, and its location, the great pressure that necessarily comes upon it in the course of filling, unless the ship is perfectly still, make obvious the impropriety of the use made of the tank. It does not rest upon inference from the event, but upon common knowledge. We have clear, positive and undisputed proof upon the record, credible in itself, and according with good sense, that it is negligence to the degree of rashness, to fill such a tank in a sea way, or in any state of the weather, without stopping the ship.

Thomas Congdon, a shipbuilder by training and Lloyd's surveyor for thirty-eight years (fols. 149, 150), testified on this point as follows (fols. 397, 398):

"Q. Do you know whether there is any rule amongst navigators as to filling tanks at sea; whether a vessel should be stopped, or whether they can fill them in motion? A. The rule of common sense is the only rule I know about. It is a very unwise thing to fill a tank at sea.

"Q. What do you say as to the prudence of filling a tank with the ship going ahead? A. I should say it was a very improper thing to do.

"Q. Why? A. Because when the tank is partly full of water and the ship is in motion, it swashes up, and is liable to break on (down) the bulkhead. I have seen a bulkhead knocked flat on the ship's bottom, where the tank has not been full, the ship rolling and water swashing knocked the bulkhead down."

Cross-examined (fol. 404), he said:

"Q. Do you know anything about hydraulic pressures? A. Tell me what you want to know?

"Q. Do you know how many additional pounds or tons pressure is brought on a bulkhead by the increase of one foot in a stand-pipe (an allusion to the mode of testing tanks in new ships, fol. 155)? A. Yes, sir.

"Q. In a bulkhead of the size of that of the tank of the Carib Prince, how much additional pressure would be brought on that bulkhead? A. I must know the area of the bulkhead.

"Q. You saw the bulkhead, didn't you? A. I will tell you that about six or seven or eight inches rather, in this standpipe, would be about a pound pressure on each square inch of the bulkhead, and you can calculate the whole thing.

"Q. Would a pressure of that much on that bulkhead, be as great as, or greater than, the pressure caused by the water being in movement, when the tank was not full? A. Nothing to compare it to; you can't compare the two.

"Q. You think there is nothing in the nature of forces that you can compare between pressure and impulse? A. The swash is the more severe of the two on the bulkhead, most decidedly.

"Q. If the sea is smooth, and the steam vessel is not rolling, would the tanks suffer any extraordinary strain by being filled at sea? A. If the water is perfectly smooth, of course it could not suffer. If there is motion of the ship, either rolling or plunging, it naturally would.

"Q. If there is no such motion, there is no danger of that? A. Quite so.

"Q. It is due to the surge of the water coming with an impact on the bulkhead? A. Exactly.

"Q. Would not such an impulse as that have a tendency to snap off a great many heads of rivets? A. I have seen a bulkhead knocked right down.

"Q. That meant a great many heads were torn down? A. I don't know what preceded it."

Frank Martin, a marine engineer and surveyor of fifteen years' experience, also a shipbuilder by training (fol. 268), testified (fol. 272):

"Q. What do you say as to its being a prudent thing to fill such a tank without stopping ship? A. I say it is not prudent.

"Q. Why? A. The immense volume of water there is pressing against the bulkhead with the motion of the ship going through the water."

Captain Saunders, a master mariner, who had been in command of steam vessels with this class of tank (fols. 251, 258), now superintendent for the Prince Line, which operates about fifty steamers (fols. 251, 252), testified (fol. 258):

"Q. Can you say whether or not it is a prudent thing to do, to fill the peak tank at sea without stopping the ship? A. It is not. The proper thing is, a ship should be stopped and perfectly still. It is a very unwise, unsafe thing to do on account of the strain, the motion of the water causing heavy strain on the bulkhead."

This, as Mr. Congdon well said, is "the rule of common sense." It is also the rule of which a skilled master should know and observe. It is enjoined upon mariners by the hand books issued for their guidance. Thus, in Mitcalfe's Suggestions to Mariners (Newcastle, 1886), it is said:

"No. 29. The captain of a steamer well loaded with grain or other perishable cargo, disc just awash, should not be persuaded while steaming at sea to fill any of the ballast tanks under the cargo; to alter the trim and increase the speed; success is doubtful at the best, while even if the tank is tight to commence with, the engineer will probably leave the sea cock open after the tank is full and strain it. Certainly a claim for damage to cargo will result and may, perhaps, be the most fortunate result of a reckless and wilful act of improper navigation."

"No. 30. It is time enough to think of filling the tanks *when required to stiffen the vessel.* * * * Let the captain think twice before doing it, and reflect that he opens a three inch hole in one bottom without seeing the other one, or knowing where the water goes. Being in charge of many lives and of valuable cargo, he will do well to watch this risky operation from start to finish and himself order the sea cock to be closed, or see it done, or he may find himself personally liable if damage results from neglect of this precaution.

"No. 109. Remember also, that it is exceedingly dangerous to run up your ballast tanks at sea when the vessel is rolling, as there may be a diffiulty *in filling* them or the tank top may be injured by the water rushing from side to side."

(*c.*) It was a fault that the ship was not stopped (fol. 305) when the tank was filled. She was then rolling. In the engineer's log (p. 162), during the watch from 8 P. M. to midnight of September 3d, he records: "Pumped up the fore peak tank" and "ship rolling." This is also confirmed by the mate's log (p. 159), which shows the course in that watch to have been N.W. by N.½N., and the wind a "strong breeze" from E.N.E.—a point abaft the beam. If, in these circumstances, she rolled appreciably (as would be only natural), it is reasonably certain she was also pitching in some degree; certainly enough

to cause great swashing about of the water in the tank during the process of filling, and thus bring a heavy strain on the bulkhead, at the acute angles formed by its junction with the rounding bow of the ship's sides. The fault of filling the tank while the ship was in motion is within the negligence clause of the bill of lading, which since the public policy of this country has been changed by the Harter Act, may now be here upheld.

Mr. Congdon points out that the pressure from water in movement, in such circumstances, is very far greater than that arising from the usual standpipe tests (fols. 403, 404), by which the adequacy of bulkheads for reasonable and proper use are tested (fols. 155, 222).

(*d.*) A strong inference of the original sufficiency of the rivet for any proper use of the tank, and that it was broken by an improper use, arises from the evidence as to care used in the original riveting, and from the fact that it successfully passed all the usual tests for strength. There is no evidence that the broken rivet showed any flaw or defect that might not be in any piece of metal which has to be hammered while cooling. The defect of brittleness described by Engineer Keeys, was always there from the time the rivet first cooled off, after being hammered. Nevertheless, it did not weaken the rivet so that it lacked the required strength as measured by the usual tests, which have not been attacked by the libelant, either for their thoroughness or sufficiency. It was also strong enough to hold through the hurricane experienced on the previous voyage—one of the severest storms of a stormy region. We know it was not affected then because the head did not break off until this voyage, when it was found on top of the cargo, under the leak, with the metal showing a fair break. It was broken in the countersink, a depression in the side of the plate, into which the head was driven up in riveting. Its own weight would have caused it to drop, if broken before, and it clearly could not have received any strain sufficient to break it before, because the cement coating on the inside of the tank was found, on examination after the hurri-

cane, to be neither broken nor cracked (fols. 130, 131, 134–138).

(*e.*) This train of circumstances leads strongly to the conclusion that a sufficiently good rivet here gave way, owing to a wrong use made of the tank, and that accordingly the loss should be regarded as due to an accident to the hull or its appurtenances, caused by a wrong act of management or navigation by the master, within both those exceptions in the bill of lading. The loss appears to be clearly within the language of the exceptions, which are admitted to have been lawful where made, and which our recent legislation now permits to be upheld in this Court. Where a vessel is generally seaworthy, but an accident results from the giving way of some appliance which in no way affects her seaworthiness, but only results in damage to cargo, it is unnecessary to resort to the doctrine of the implied warranty of seaworthiness in order to reach a just conclusion as to liability. If there is no appropriate exception in the bill of lading to cover it, the ship should respond upon other principles. If there is such an exception the ship should have the benefit of it (The *Curlew*, 51 F. R., 246; 8 U. S. App., 405; The *Miranda*, L. R., 3 Ad. & Ec., 561; The *Virgo*, 3 Asp. Mar. Cas., 285; The *William Lindsay*, L. R., 5 P. C., 338).

V.

The loss is within the exception of "latent defects in hull, machinery or their appurtenances."

This exception is broad and specific enough to exempt the vessel from the damage, whether the defect in the rivet amounts to unseaworthiness or not. It is plain, unequivocal, and the usual form of exception from latent defects that is found in the great majority of ocean and inland bills of lading.

I. The appellant argues that the *Caledonia* (157 U. S., 124) is opposed to the contention that this exception may be viewed as a modification of the implied warranty of seaworthiness. We must, therefore, at the outset, point out the essential grounds of difference between the two cases.

The grounds on which the decision of the Caledonia proceeded are: (*a*) that the exception of "steam, boilers and machinery, or defects therein," was not sufficiently definite and specific to be a modification of the implied warranty of seaworthiness; and (*b*) that as the exception formed part of a long enumeration of excepted causes of damage, all the rest of which related to matters subsequent to the beginning of the voyage, this one must be treated as equally limited in scope.

(**a**) The exception of "*latent defects in hull, machinery and other appliances,*" contained in this bill of lading, is more specific and definite than that of "defects in machinery" in the *Caledonia* case. The exception now under consideration is an express modification of the implied warranty of seaworthiness in the ordinary meaning of words. While it is doubtless correct to say that stipulations in bills of lading are construed most strongly against the shipowner, nevertheless, this doctrine is not to be carried to the extent of substituting for the plain intention of the parties as fairly expressed in their contract, a fictitious presumption of their intention. The aim of the Court must be, as stated by Lord HALSBURY, in *Hamilton* vs. *Pandorf* (12 App. Cas., 518, 524), "To give effect to all the words that the parties have used to express what this bargain is"; or, as stated by Mr. Justice NELSON, in *Bulkeley* v. *Naumkeag Co.* (24 How., 386, 394), "*We must look to the substance and good sense of the transaction;* to the contract as understood and intended by the parties, and as explained by its terms, and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained in order to determine the scope and extent of them."

Looking to the "substance and good sense of the transaction," we find that the words employed were apt to relieve the shipowner from defects existing in the ship at the time the contract of carriage was entered into; that the implied warranty of seaworthiness, as a warranty against latent defects, is a harsh rule from which the shipowner would naturally desire to be relieved; and that the mutual intention to give such relief would be quite natural in view of the fact that Congress, by the Harter Act (*Post*, Appendix I.), has given relief from it in a large class of cases. It is to be presumed that insurance policies have been reformed to meet the increased risk put upon cargo by the Harter Act, and that insurance against latent defects is now readily obtainable. The cargo owner receives a consideration for the exception in a diminished rate of freight (The *Wells City*, 61 Fed., 857, 859).

The four Judges who have already heard this case have concurred in holding that the exception of latent defects was an express modification of the implied warranty of seaworthiness. BENEDICT, *J.* (p. 168), held:

"The law of England, as declared in the case of the Cargo *ex Laertes* (12 Prob. Div., 187), is to the effect that by the laws of England, such an exception as that contained in the bill of lading sued on, if it does not abrogate, at all events limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the vessel, if due diligence is exercised by the ship owner. Applying that law to this case, it follows from the fact that the weak condition of the iron rivet could not be discovered by the exercise of due diligence, that the ship cannot be held liable for the injury to the libelant's cargo because the danger arose from a latent defect in the rivet which gave way, within the exception in the bill of lading, under which the merchandise was carried."

SHIPMAN, Circuit Judge, delivering the opinion of the Court of Appeals (p. 212), said:

"The bills of lading in these cases exclude losses arising from latent defects in the hull, and the question is, whether this language does not necessarily mean defects

existing at the time of shipment, and therefore whether it does not clearly and even expressly exclude unseaworthiness arising from such defects. The only case in which the effect of an exemption of latent defects is discussed, is the *Laertes*, 12 Prob Div., 187, but in that case, the language of the bill of lading was 'latent defects * * * even existing at time of shipment,' so that the intention of the parties to limit the implied warranty was manifest. In the cases at bar, it is urged that 'latent defects' must necessarily mean those existing at the time of shipment, and that any other construction is exceedingly strained. A defect in order to be latent must have been discoverable at the time of the shipment. It could not in its nature have been capable of discovery then, and have become capable of evading discovery subsequently. A construction which should say that 'latent defects' meant only those which had become latent since the vessel left the wharf, and could not mean previously existing defects, savors of the distinctions of the school men; and if latent defects existing upon the voyage are exempted, those existing at the time of shipment are included, for they are the same. We concur with the experienced District Judge that the exception 'limits the warranty which the law would otherwise imply that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the owner.'"

We submit, with deference, that the exception in the *Laertes* case, of "latent defects, even existing at time of shipment," expresses no further thought than the simple exception of "latent defects." The word "latent" speaks in the present tense. *Latens*, from which we derive the adjective *latent* is the present participle of the verb *lateo*, to lie hidden. In the Standard Dictionary *latent* is defined as "Not visible or apparent: *with the implication of existence and potential activity*; concealed, hidden, dormant, as latent powers, * * * latent ambiguity." A *latent defect* is, necessarily, an existing, lurking, inherent defect. When, therefore, the words "latent defect" are put in a bill of lading, they mean hidden defects existing at the time the bill of lading is issued. To say, as was said in the *Laertes*, that the ship was exempted from latent defects, even existing at the time of shipment, is simply to say the same thing twice.

This exception was obviously inserted for the purpose of exempting the ship from some liability to which, without such exception, she would be subject. Without such an exception the ship would be liable for unseaworthiness due to latent defects at the time of shipment. No other liability to which it may be presumed to apply can be suggested. It is evident from the language that the shipowner intended the exception to relieve him from that particular liability. Can the libelant reasonably pretend that she did not so understand the exception? She could not be heard to say she did not understand latent defects to include defects which existed at the time she received hér contract, because she is presumed to understand the meaning of the words in their ordinary sense. It is impossible to conceive that two reasonable persons about to enter into a contract would insert a stipulation against latent defects, and mutually agree or understand, at the time, that it was only to apply to defects which might become latent in the future. Yet this is what the appellant's argument as to the meaning of the exception ultimately comes to.

(b) This exception, unlike that in the *Caledonia*, does not stand in a long enumeration of exceptions relating to matters subsequent to the beginning of the voyage, and hence does not fall within the second ground of the decision in that case.

The contract here (pp. 145, 146), was for delivery "in the like good order and well conditioned, at the aforesaid port of New York [subject to the enumerated exceptions on page 146] unto J. W. Wuppermann." Between the words "at the aforesaid port of New York" and the words "unto J. W. Wuppermann," are two paragraphs of exceptions, some of which "relate to matters subsequent to the beginning of the voyage," but a large number of which relate to matters prior to the voyage. Amongst the latter are loss or damage from (1) fire on board in hulk or craft, or on shore; (2) latent defects in hull, tackle, boilers and machinery, or their appurtenances; (3) inaccurate description of goods shipped; (4) insufficiency in packing or in strength of package; (5)

inaccuracies of marks, numbers, designation or address on the packages.

It is not denied in the *Caledonia* that the carrier may, by apt words, limit or modify the implied warranty of seaworthiness, or that such a clause introduced in the bill of lading relates back to and modifies the warranty as of the time of shipment. The Court referred, with apparent approval, to the *Laertes* (*supra*), saying:

"The exceptions were held to limit the implied warranty of seaworthiness *in accordance with the expressed intention of the parties to that precise effect*, and for that reason only, take the case out of the general rule."

And, as if to save future cases, the Court added:

"*We are not dealing with the question of how far exceptions may be given effect in particular cases*, but whether by those under consideration claimants were exempted from liability for unseaworthiness, and we are clearly of opinion that they were not."

In the case at bar we submit that the implied warranty of seaworthiness is modified by "the expressed intention of the parties to that precise effect, and that the *Caledonia* does not control."

There is no liability from which the Court ought to be more willing to permit a shipowner to obtain exemption than from that for latent defects. From the nature of the case this liability arises wholly without his fault. The bare statement that the defect is latent shows that it has baffled and must baffle the extremest diligence and care. No liability for damages arising from latent defects could be established, except under the doctrine that the carrier is an insurer (The *Flowergate*, 31 Fed., 763; The *Concord*, 58 Fed., 913). This extraordinary liability has been taken away in some cases by statute, as in Germany, where a latent defect is treated as *force majeur* (Imperial Code of Commerce, Sec. 607).

2. The English rule with regard to the scope and extent of the exceptions in bills of lading is more liberal than that suggested in the *Caledonia*.

Carver, Carriage by Sea, Sec. 58, states it thus:

"When, however, a bill of lading has been given and taken, its provisions must be considered to relate back, and apply to what has been done in regard to the shipment before it was given. It is to be taken as the expression of the contract under which everything has been done. Thus, the exceptions of risks contained in it apply to the stowage of the goods, although that may have been completed before the bill of lading was given (citing the *Duero*, L. R., 2 A. & E., 393; *Pyman* v. *Burt*, 1 Cab. & E., 207; *Norman* v. *Binnington*, 25 Q. B. D., 475, 478; *Nottebohm* v. *Richter*, 18 Q. B. D., 63)."

In the last case cited, Lord Justice LINDLEY (p. 66) said:

"But we must not look only to the grammatical construction; and the proper way to treat the matter is that the exceptions apply to all the risks which the shipowner takes."

And in *Norman* v. *Binnington* (*supra*), A. L. SMITH, *J.* (p. 477), said:

"In this bill of lading the shipowner has exempted himself from damage to the shipper's goods by reason of rain, or of contact with other goods. This is not disputed, but the shipper contended that this exception does not apply, first, to damage done before the voyage has actually commenced. * * * As regards the first point, I do not agree with it. In my judgment, when once a shipowner has received a shipper's goods on board, and has, by his captain, given a bill of lading in the ordinary form for them, he is bound to deliver them at the port of discharge in the like good order and condition as when shipped, except he is exempted by exemptions contained in the bill of lading, and it is immaterial when the voyage in fact commences. * * * In my judgment, the shipowner under this bill of lading is *prima facie* exempted from liability for damage by rain, or by contact with other goods, after the goods have been shipped, whether the ship had started on her voyage or not."

3. It is generally understood in the commercial world that the exemption of "latent defects" amounts to a modification of the implied warranty of seaworthiness

(*Pollock on Bills of Lading*, 39). The Court should, if possible, adopt the well known commercial construction.

(*a.*) The wording of the exception found in this bill of lading, of "*latent defects in hull, tackle, boilers and machinery, or their appurtenances*," was adopted and has been retained after prolonged deliberation. Discussion of the form of this and the negligence clause has extended over a period of more than thirty years. The history of the discussion and of the results reached is given in *Wendt's Papers on Maritime Legislation*, Chapter II., entitled "The International Law of Affreightment in Connection with the Attempts to Agree upon Uniformity in the Wording of Bills of Lading" (pp. 295-513).

From this account it appears that the agreement reached in regard to general average by the York Congress of 1864 led to attempts to come to some similar arrangement upon the subject of freight and contracts of affreightment. The first step in this direction was a *projet* in regard to *freight* drawn up by two of the Belgian delegates to the International General Average Congresses (Wendt, p. 295). It was approved by an Executive Council of the National Association for the Promotion of Social Science, which met in Sheffield, October 5, 1865, under the presidency of Sir Robert I. Phillimore (Wendt, pp. 298, 308).

Changes in the terms and conditions of contracts of affreightment, found necessary by the different commercial conditions which followed the introduction of iron and steel vessels as instruments of commerce, were first considered in public deliberations after the opening of the Suez Canal, in July, 1871, at a meeting of merchants and others engaged in trade to the East, who agreed upon an Eastern Trade Bill of Lading (Wendt, p. 309). The form of this document is not preserved (Wendt, p. 345).

(*b.*) The deliberations of this committee were not, however, of an international character; and Dr. Wendt observes (p. 309) that it was left to the *Association for the Reform and Codification of the Law of Nations* to resume in 1879 the consideration of the international law

of affreightment at the very stage it had been left by the Sheffield Congress in 1865.

Three years were spent in correspondence and preparations for a meeting to deal with the subject, and in drafting the model bill of lading. The conference met at the Town Hall, in Liverpool, August 8, 1882, to debate the terms of the proposed bill (Wendt, p. 356).

The committee which drafted the form of the document submitted to the Association for its action was composed of representatives of the following commercial interests: (1) The Ship Owners' Association (two members); (2) the Steamship Owners' Association (two members); (3) the Chamber of Commerce (two members); (4) the American Chamber of Commerce (two members); (5) the East India and China Section of the Chamber of Commerce—English (two members); (6) the Iron and General Metal Trade Section of the same chamber (two members); (7) Cotton Section of the same (two members); (8) the Underwriters' Association (two members); (9) the Liverpool Law Society (two members), who were asked to take part in order to advise the committee on points of law and to assist in the framing of clauses. There were in addition seven of the Central Association members on the committee, who took part *ex-officio* in the deliberations of the committee (Wendt, p. 359). It will be observed, therefore, that the cargo and underwriting interests had on this committee *fourteen* members; that the ship owners and steamship owners had but *four* members; that there were two members from the Law Society and seven members from the General Committee. Even if it be assumed that the two lawyers and the seven members of the General Committee all took part in the interest of ship owners (a most improbable assumption), the committee which drafted the bill of lading submitted to the Conference would be composed of *fourteen* members representing cargo interests against *thirteen* representing ship owners' interests. Such a committee, presumably, would deal fairly with the cargo interests, however strict they might be in excluding provisions favorable to the ship owners.

The draft bill of lading (Wendt, pp. 363, 366), was considered carefully, clause by clause, by the

full body of the Association (Wendt, pp. 366–379). The result of their deliberations was the adoption of the form of document, since known as the "Liverpool Bill of Lading, 1882" (Wendt, pp. 379–382; Carver, Carriage by Sea, 2d Ed., p. 761).

In the draft bill presented to this Conference the clause in regard to latent defects was expressed as follows (Wendt, p. 364):

"Ship not answerable for losses through explosion, "bursting of boilers, breakage of shafts, *or any latent de-* "*fect in the machinery or hull* not resulting from want of "due diligence by the owners of the ship, or any of them, "or by the ship's husband or manager."

This clause was, without doubt, introduced as a limitation upon the shipowners' obligation as defined in *Lyon* v. *Mells*, 5 East., 428; *Kopitoff* v. *Wilson*, 1 Q. B. D., 377, and *Steel* v. *State Line*, 3 App. Cas., 72, to the effect that under his implied warranty of seaworthiness, he contracts not merely that he will do his best to make the ship reasonably fit, but that she *shall be* reasonably fit for the voyage (The *Gelfruin*, 10 Prob. Div., 103, 108).

It is remarkable that, although the discussion upon this document was very full, and participated in by a large number of European delegates, not a word is reported to have been said against the justice of this particular exemption. It was adopted by the Conference in precisely the form in which it was submitted (Wendt, p. 380).

(c.) In 1883 the New York Produce Exchange, a body composed of merchants, ship owners and agents, average adjusters and bankers, appointed a committee to draft a bill of lading for steamships, to be used as a basis of outward bound contracts (Wendt, pp. 382, 395). The committee was composed of three merchants, two ship owners, a banker and an average adjuster (Wendt, p. 395). They agreed on a form based chiefly on that adopted in Liverpool at the conference of the Association for the Reform and Codification of the Law of Nations in 1882 (Wendt, 382). In their report they proposed to retain

the clause in which occurs the exception for latent defects, but phrased as follows:

"Ship not answerable for * * * losses through ex-
"explosion, bursting of boilers, breakage of shafts, or any
"latent defect in hull or machinery, not resulting in either
"case from want of due diligence by the owners of the
"ship, or any of them, or by the ship's husband or
"manager" (Wendt, p. 387, 395-397.)

This bill, with slight modifications, was adopted by the New York Produce Exchange October 24, 1884 (Wendt, p. 405). The clause in question was slightly modified so as to read as follows (*Idem*, p. 406):

"It is also mutually agreed that the carrier shall not be
"liable for loss or damage occasioned by * * * any
"alleged defect in hull, machinery or appurtenances," the phrase "not resulting from due diligence, &c.," being omitted.

This bill of lading is now one of the standard forms (Carver, Carriage by Sea, 2d Ed., p. 366).

(*d.*) Meantime in England, in 1883, the Australian and New Zealand Underwriters' Association, consisting of eighteen separate insurance companies, and the combined London marine underwriters, consisting of thirteen companies, sent protests to the secretary of the Association for the Reform and Codification of the Law of Nations against the form of the bill of lading adopted in 1882 (Wendt, pp. 398 to 402). These protests, however, were aimed exclusively at the negligence clause, and *no objection was made in either protest to the exemption against latent defects.*

(*e.*) The New York Chamber of Commerce also, in a report, dated March 6, 1884, opposed the principle of the Liverpool and New York Produce Exchange bills of lading. They prepared an act to be introduced in Congress, making it unlawful to insert in contracts of carriage certain of the provisions which had been agreed upon in the Liverpool bill of lading, and were about to be adopted by the

New York Produce Exchange; and this act seems to have passed the House of Representatives (Wendt, pp. 402, 405). Although by this act it was made unlawful to insert any negligence exemption in a bill of lading, the effect of the third section was to permit the insertion of an exemption against latent defects. Section 3 of that act (Wendt, p. 403) provided that

"It shall not be lawful for any such vessel, her owners, "master, agent, or manager to insert in any bill of lading "any clause, covenant or agreement whereby the obliga- "tions of the owners of said vessel to properly equip, man, "provision and outfit such vessel, *and in every way and* "*manner within their, his or her power to render said* "*vessel seaworthy* and capable of performing her intended "voyage, shall in any wise be lessened, weakened or "avoided."

This did not exclude an exception of latent defects.

(*f.*) As a result of the agitation in England by merchants and underwriters against the Liverpool form, the next meeting of the Association for the Reform and Codification of the Law of Nations, in Hamburg, August, 1885 (Wendt, p. 430), rescinded its action taken at the meeting at Liverpool, in 1882, and adopted a short form of bill of lading without exceptions, but provided that it should be subject to all the conditions of the Hamburg rules of affreightment, which were also drawn up by the Association at the same time (Wendt, p. 472). These were based chiefly on a series of rules proposed by the Hamburg Chamber of Commerce (Wendt, pp. 435, 438).

The rule as to latent defects proposed by the Hamburg Chamber of Commerce (Rule 2; Wendt, p. 436), read as follows:

"Owners to be exempt from any latent defect in hull or "machinery (*not resulting in either case from unseaworth-* "*iness*, nor from want of due diligence by the owner of "the ship or by the ship's husband or manager)."

This rule, as modified by the society before adoption (Rule 2; Wendt, p. 472), read:

"The ship owner shall not be responsible for loss or "damages arising from *vis major*, public enemies, civil "commotions, pirates, robbers, fire, explosion, bursting "of boilers, breakage of shafts or screws, nor any latent "defect in hull or machinery not resulting from want of "due diligence by the owner, husband, or manager of the "ship."

The words, "*not resulting from unseaworthiness*," in the proposed rule being *omitted* from the rule as adopted.

(*g.*) The thread of this discussion was next resumed by a congress assembled at Antwerp in September and October, 1885, under order of the Belgian Government (Wendt, p. 476). This congress, amongst its conclusions, stated:

"It is, however, lawful for the parties to vary this [ship-"owners'] responsibility by special stipulations, with the "following exceptions: Owners of the ships should be "prohibited from relieving themselves, in advance, of "their responsibility by inserting a clause in the contract "of affreightment, the bill of lading, or any other agree-"ment (a) for any *acts of their captains or officers* tend-"ing to compromise the seaworthiness of the ships."

It is plain that this was not designed to prevent an exception from latent defects in the hull or machinery of the vessel; this would not, in the nature of things, result from any act of the captain or officers.

(*h.*) At a meeting of the Baltic Exchange, London, July 25, 1885, a bill of lading was adopted for use in trade with the Black Sea, Mediterranean and Baltic (Wend., pp. 428, 429). This document contained the following clause:

"Strandings, collisions, &c., are also excepted even when "occasioned by negligence, * * * but nothing herein "contained shall exempt the ship owner from liability to "pay for dunnage to cargo occasioned by bad stowage, by "improper or insufficient dunnage or ventilation, or by im-"proper opening of valves, sluices and ports, or by causes "other than those above excepted, and all the above excep-"tions are conditional on the vessel being seaworthy "when she sails on the voyage, *but any latent defects* "*in the machinery shall not be considered unseaworthi-*

" *ness* provided the same do not result from want of due " diligence of the owners, or any of them, or by the ship's " husband or manager."

In the form of the charter party for that trade the exception was extended so as to include latent defects in *hull* or machinery, or their appurtenances. These documents were before BROWN, *J.*, in the case of the Sanfield. (Appendix II. to this brief, where these provisions are set out.)

(*i.*) In December, 1885, a subcommittee of the London Chamber of Commerce (Wendt, p. 478) drafted an act, designed to be introduced in Parliament, which was entitled, " *An Act to regulate and define the duties and liabilities of* " *shipowners*" (Wendt, pp. 478-485). Section 6 of this proposed act provided:

" Any provision or exception in the bill of lading or in " the agreement purporting to relieve or exonerate in any " way any shipowner from any duty to properly equip, " man, provision, and fit out any ship, and to render it " seaworthy, or for any implied warranty of seaworthi- " ness in a contract of affreightment shall be null and " void;" but contained a proviso that " *no shipowner* " *shall be liable for injury, damage, or loss as afore-* " *said caused by or arising from any latent defects* " *in the hull, machinery,* tackle, equipment, or outfit of a " ship, which could not have been discovered by reason- " able care or skill on the part of the shipowner, master, " crew, servant or agent."

That this committee, representing cargo interests chiefly, voluntarily inserted the proviso concerning latent defects, is a concession of the reasonableness of the exemption. This report was adopted and confirmed by the general committee of the London Chamber of Commerce, April 5, 1886, but was not followed by any action of that body (Wendt, p. 486).

(*j.*) In the month of May, 1886, the Chambers of Commerce of Hamburg and Bremen, as well as the associations of shipowners at those ports, agreed upon the adop-

tion of a uniform bill of lading for steamships, and issued a statement respecting its introduction (Wendt., pp. 487, 490). That document contained an exception of "any latent defect in hull or machinery, not caused by unseaworthiness or want of due diligence by the owner or 'ship's husband.'"

(*k.*) Action was next taken on this subject in England at the meeting of the Association for the Reform and Codification of the Law of Nations, which met in London July 25, 1887, under the presidency of Sir Charles Butt, one of the Judges of the Admiralty Division (Wendt, p. 493) The subject of the form of the bill of lading was there fully discussed again by the representatives of different nations, including our own. Dr. Sieveking, president of the Hanseatic Court of Appeal at Hamburg, presiding during most of the discussion (Wendt, p. 496). The result of the deliberations was that the association receded from its action taken at Hamburg in 1885, passing the motion of Mr. Gray Hill, of Liverpool, to return to the bill of lading adopted by its conference in Liverpool in 1882 (Wendt, pp. 497, 506).

(*l.*) It is not reasonably to be doubted that in all of these cases the committees of shipowners, merchants and underwriters, who drew up the foregoing forms of bills of lading, understood and intended that the exception of latent defects should exclude all liability on the part of the owner for latent defects which existed at the time of shipment. The purpose of the exception is so universally known and recognized that any other interpretation of it would be a departure from the usual commercial construction.

VI.

THE EXCEPTION OF "LATENT DEFECTS," IS NOT UNLAWFUL AS OPPOSED TO SECTION 2 OF THE HARTER ACT.

1. The first and second sections of the Harter Act are not designed to apply to contracts made abroad, but only to those made in this country.

The Act in question (27 Statutes, 445), is appended (*post*, p. 53). The differences in the phraseology of the first, second and fourth sections from that adopted in the third section, support the contention stated.

The first section provides that it shall not be lawful for the owner, &c., of "any vessel transporting merchandise or property *from or between ports of the United States and foreign ports*" to insert in any bill of lading or shipping document any clause designed to relieve the shipowner from liability for negligence "in proper loading, stowage, custody, care or proper delivery" of the merchandise. It further provides that all such clauses shall be null and void and of no effect.

Section 2 provides that it shall not be lawful for "any vessel transporting merchandise or property *from or between ports of the United States of America and foreign ports*," her owner, &c., to insert in any bill of lading or shipping document any covenant or agreement "whereby the obligation of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle or stow her cargo, and to care for and properly deliver same, shall in anywise be lessened, weakened or avoided."

The third section provides more broadly "that if the owner of any vessel transporting merchandise or property *to or from any port in the United States of America*, shall exercise due diligence to make the said vessel in all respects seaworthy, &c., neither the vessel, her owner or owners, agents or charterters, shall become or be held responsible for damage or loss resulting from faults or

errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agents or master, be held liable for losses arising from dangers of the sea or other navigable waters," &c, nor for deviation in rendering salvage services.

Section 4 returns to the phraseology of sections 1 and 2. It provides that it shall be the duty of the owner or owners, master or agents "of any vessel transporting merchandise or property *from or between ports of the United States and foreign ports*, to issue to shippers of any lawful merchandise, a bill of lading" containing marks, numbers of packages, quantity, &c., stating whether it is carrier's or shipper's weight.

Section 5 provides "that for a violation of any of the provisions of this act, the owner or master of the vessel, guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding $2,000."

From these differences of phraseology it seems that the first, second and fourth sections were designed to apply only to cases where the bill of lading is issued in this country. This is confirmed by another circumstance. A violation of either of those sections entails a fine (Sec. 5). But the penal laws of one country have no extra territorial force, and cannot affect the rights of citizens of another (*Wharton, Conflict of Laws*, Secs. 4, 108, 883). It will not be assumed that Congress intended the act to apply, except where the general law will permit the enforcement of all of its provisions.

There is nothing in the statute evincing a clear intent to make any of the acts prohibited by the first, second and fourth sections of the statute unlawful if committed abroad; or that a bill of lading, which contained provisions contrary to Sections 1, 2 and 4, if lawful where made, should not be sustained and enforced in the courts of the United States.

2. Assuming the second section of the act applies to vessels inward bound, it does not prohibit the introduction of an exception against "latent defects."

This section as introduced by Mr. Harter (*post*, p. 53), and finally passed, is shown below:

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents or servants, to carefully handle and stow her cargo, and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

(NOTE.—The parts in italics were struck out by amendment.)

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence* [*to*] properly equip, man, provision and outfit said vessel, *to* make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants, to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

(NOTE.—The parts in italics were inserted by Senate amendments.)

It would seem from these changes that the design of Congress was simply to prohibit the insertion of a clause relieving a shipowner from the duty of using *due diligence* to make the vessel seaworthy. In other words, "the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision and outfit said vessel and to make said vessel seaworthy" are made *statutory obligations;* and it is then provided that no contract shall be lawful by which those specifically defined obligations are sought to be "lessened, weakened or avoided."

It is a mistake to argue, as contended by the appellant (Brief, p. 18), that Congress in this section "recognized "the obligations of the owner as of two kinds: (1) the ob- "ligation of the owner to exercise due diligence to prop- "erly equip, man, provision and outfit said vessel; (2) the "obligation *to make* said vessel seaworthy."

The statute speaks of "obligations," and proceeds immediately to define them as (1) the obligation to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and (2) the obligation to exercise due dili-

gence to make said vessel seaworthy (The *Delaware*, 161 U. S., at p. 470), and further provides that it shall be unlawful to insert any clause in a bill of lading whereby those obligations, *so defined*, shall be lessened, weakened or avoided.

That this was the intention of Congress is made clear by the third section, which transposes the dual obligations, mentioning first the duty as regards seaworthiness, and secondly the duty as to manning, equipping and supplying the vessel, limiting both of these obligations to the duty of using due diligence in regard to them.

3. It is improbable that Congress could have intended to prohibit an owner from contracting against a liability, not due to his fault, and which he cannot prevent.

In Germany the harshness of the rule as to latent defects led to the introduction of a provision in the Commercial Code, § 607, that "loss and injury arising from a defective condition of the vessel which, in spite of all possible caution, could not be discovered, are to be considered as loss and injury by the act of God."

The legislation of the Harter Act is thus directly in line with the previous legislation of Germany.

In the recent case of the *Millie R. Bohannon* (64 Fed. R., 883), Judge BROWN, dealing with the scope and evident purpose of the statute, said:

"The design of the Harter Act was, I have no doubt, to relieve the carrying vessel from her previous responsibility as insurer against latent defects; and to limit her liability as respects her seaworthiness to the obligations of 'due diligence' to make the ship seaworthy."

The references under appellant's third point do not show that, under the continental practice, a shipowner is liable, even in the absence of contract, for damage from latent defects. The contrary is believed to be the case.

VII.

THE SHIP IS RELIEVED FROM LIABILITY FOR LATENT DEFECTS BY THE PROVISIONS OF THE HARTER ACT.

(*a.*) By the second section of this act, it is unlawful for any vessel transporting merchandise or property from or between ports of the United States and foreign ports, her owner, master, &c., to insert in any bill of lading a covenant whereby "the obligations of the owner or owners of said vessel *to exercise due diligence* [to] properly equip, man, provision and outfit said vessel and to make said vessel seaworthy" shall be lessened, weakened or avoided.

The effect of this is (1) to define the obligations of the owners as to seaworthiness and equipment of the vessel, making them statutory; and (2) to make it unlawful to insert any stipulation lessening the obligations thus defined.

If this view be correct, it would follow that even apart from a contract, a shipowner would not be liable for damage arising from unseaworthiness, provided it was latent and undiscoverable, by the exercise of due diligence, at the outset of any particular voyage.

(*b.*) That this was the intention of Congress, is borne out by the language of the third section, the opening clause of which provides:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America *shall* [1] *exercise due diligence to make the said vessel in all respects seaworthy*, and [2] properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters," &c.

The preliminary part of this section is a condition to the owner's relief from liability on account of the losses enumerated in the second part. Relief comes under this section, irrespective of contract. It is statutory, and must bo accorded, irrespective of contract, unless the latter expressly or by necessary implication excludes the operation of the statute. When, therefore, the Court has to deal with a warranty which is not expressed in the shipping document, but is stated to be an implied warranty of seaworthiness, that warranty should not be placed any higher than the obligation of the owner is placed or recognized by statute.

(c.) A number of cases have held that the effect of this statute is to relax the former strict rule with regard to seaworthiness.

In the *Millie R. Bohannon* (64 Fed. Rep., 883), BROWN, *J.*, dealing with the scope and purpose of the statute, said:

"The design of the Harter Act was, I have no doubt, to relieve the carrying vessel from her previous responsibility as insurer against latent defects; and to limit her liability as respects seaworthiness to the obligations of 'due diligence' to make the ship seaworthy."

In the *Silvia*, 68 Fed. Rep., 230; 35 U. S. App., 395, WALLACE, *J.*, in delivering the opini on of the Court of Appeals, said:

"It is perfectly obvious from the language of this act that Congress intended to relax the severity of the obligation imposed on the shipowner as a carrier of goods by the pre-existing law as it had been declared by the courts. It had long been determined that in every contract for the carriage of goods by sea there is an implied warranty that the vessel is seaworthy at the time of beginning her voyage, unless this is superseded by some express condition in the contract, * * * It has also always been the law that the exemption of the dangers of the seas in the bill of lading or other contract of affreightment does not exonerate the shipowner from responsibility for injury to the goods which

results from a breach of his implied obligation to provide a seaworthy vessel. Thus the carrier was responsible for a loss produced by the dangers of the sea if it was one which would not have happened except for the concurrencence of some unknown and undiscoverable defect in the equipment of the vessel, which defect, because it was not discoverable, could not be remedied. *In the place of this responsibility*, the act of Congress substitutes a *less stringent one* by declaring that if the owner shall exercise '*due diligence*' to make the vessel in all respects seaworthy, neither he nor the vessel is to be responsible for damages or loss in transporting merchandise, resulting from 'faults or errors in her navigation or management,' nor for losses arising from dangers of the sea. Other sections of the act emphasize the meaning of the particular section. Sections 1 and 2 prohibit carriers from relieving themselves by contract from the obligation of exercising 'due diligence to make their vessels seaworthy.' * * * Read as a whole, the purpose of the act manifestly is, on the one hand, in the interests of the public, to prevent carriers from evading responsibility *to exercise due diligence* in providing seaworthy vessels, and in the handling and care of the cargo; and, on the other hand, *whenever they have exercised due diligence in these respects*, to absolve them from liability for losses arising during the transit from the perils of the sea, and from faults or errors in the navigation or management of vessels."

This Court, in the *Delaware* (161 U. S., 459, 471), said: "It is entirely clear, however, that the whole object of "the act is to *modify* the relations previously existing be- "tween the vessel and her cargo."

(*d.*) If it be found on the evidence of Mr. Congdon and Mr. Martin and Captain Saunders that the master's act in filling the tank at sea, while the ship was rolling, was negligence, such negligence would be a *fault or error in the management or navigation* of the ship, within the third section of the Harter Act. Plainly, the owner would be relieved from liability for the loss, notwithstanding the latent defect, because he had "used due diligence to make the said

vessel in all respects seaworthy," within the language of the same section. It would be very unreasonable to hold that the ship was not absolved from liability for latent defects, if the master's act did not amount to a fault or error in the management or navigation of the ship, or was not a "danger of the sea or other navigable waters." Such a holding would be equivalent to saying that an owner shall not be liable for a latent defect, if the immediate cause of the damage resulted from the negligence of his servants, but shall be if they were not negligent, although in each case due diligence to make the ship seaworthy has been exercised.

VIII.

IF THE LOSS WAS CAUSED OR CONTRIBUTED TO BY THE NEGLIGENCE OF THOSE IN CHARGE OF THE STEAMER, IN THE MODE OF FILLING THE TANK, OR TAKING SOUNDINGS, OR IN THE OMISSION TO SOUND, SUCH NEGLIGENCE WAS IN THE MANAGEMENT OR NAVIGATION OF THE SHIP, WITHIN THE MEANING OF THE THIRD SECTION OF THE HARTER ACT, WHICH ABSOLVES THE SHIP FROM ALL LIABILITY THEREFOR.

1. The evidence tending to show mismanagement in the filling of the tank has been specifically referred to. If the evidence as to that, which is uncontradicted, be accepted by the Court as proof of fault, and if such fault caused or contributed to the damage, the owner is relieved from any liability from such cause. Due diligence to make the vessel seaworthy, within the requirements of the third section of the act has been shown, and the act of filling the tank was one in the "management or navigation of the ship," and the fault in that regard, if any, was a fault specifically enumerated in the third section of the statute (The *Glenochil*, 1896 Prob., 10;

The *Silvia*, 35 U. S. App., 395; The *Sandfield*, Appendix post., p. 56).

2. If there was any negligence in regard to taking soundings, either of the tank or of the No. 1 hold, during the process of filing, such negligence would also be a "fault in the management of the ship" (The *Glenochil*, *supra;* The *Sandfield*, *supra*).

In the latter case, the failure of the engineer to open a sluice door on a bulkhead, which was a substitute for sounding through pipes to ascertain the presence of water in a cargo compartment, was held to be a fault in the *management* of the ship.

There was no trouble with the sounding pipe in this case. The water was finally discovered in the hold by that means (fols. 324, 325).

The appellant's argument that the sounding failed to disclose water during the 4th of September (the day after the tank is claimed to have been filled), because the limber boards were too tight, is answered by the preponderating proof that the leak in the tank was discovered on the morning next after it was filled and the water was then pumped out. It did not remain there over a day as contended by the engineer (fols. 32, 47, 323).

The chief officer's log contains no entry on the 3d or 4th of September, of filling the tank, but only an entry of emptying it on the 5th (pp. 159, 160, 161). The chief engineer's log (p. 162), contains an entry September 3d: "pumped up fore peak tank," but the Court will observe that the entry is apparently an afterthought. The preceding and subsequent entries on that date, are opposite the commencement of the respective watches, but opposite the watch beginning 8 P. M., two marks are made across the page, apparently to indicate that there was no entry to make after that watch. The entry is afterwards written in between that time and the commencement of the following watch (p. 162). He enters the pumping out of the tank on September 5th (p. 164),

but this entry is contrary to the recollection of both the captain and the carpenter (fols. 32, 47, 323).

It was found in both courts below that the leak was discovered *on the next morning after the tank was filled.* This finding robs the argument about failure to sound and tight limber boards of all force.

Last Point.

THE DECREE APPEALED FROM SHOULD BE AFFIRMED WITH COSTS.

New York, April 21, 1897.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Claimant-Appellee.

J. PARKER KIRLIN,
Of Counsel.

APPENDIX I.

HARTER ACT.

(NOTE.—Italics indicate parts changed by amendments in the passage of the bill).

P. R. 9176.

A BILL relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted, etc., That it shall not be lawful for *any common carrier* or the manager, agent, master or owner of any vessel transporting merchandise or property from or between parts of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and* any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and

[PUBLIC—No. 57.]

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence* properly equip, man, provision, and outfit said vessel, and *to* make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly

properly deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between* ports in the United States of America *and foreign ports* shall, *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery*, nor shall the owner or owners, *the vessel*, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, commercial carrier, or*

deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel nor shall the *vessel*, her owner or owners, charterers, *agent*, or master be held liable for losses arising from dangers of the sea *or other navigable waters*, acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be*

other person representing such vessel, has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section 1 or section 2 of this act, or if he is informed and is satisfied that the owner, agent, master, or other person representing such vessel, will not issue bills of lading, as required by section 4 of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents have been previously issued, until they are modified to conform to the requirements of said sections.

SEC. 6. That this act shall not be held to modify or repeal Sections 4281, 4282, and 4283 of the Revised Statutes of the United States.

SEC. 7. That this act shall take effect from and after the 1st day of *September, 1892.*

(Passed the House, amended to read as above, December 16, 1892. 24 Cong. Rec., pp. 147–149, 169.)

liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, *or any other statute defining the liability of vessels, their owners, or representatives.*

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of *July*, eighteen hundred and *ninety-three.*

Passed the Senate as amended February, 1893. 24 Cong. Rec., 1275. Senate amendments concurred in February 8th, 1893. 24 Cong. Rec., 1342.

Approved, February 13, 1893.

APPENDIX II.

THE SANDFIELD.

(District Court, S. D., New York, February 27, 1897.)

1. Damage to Cargo—Broken Rivet—Sea perils.

At the close of a stormy voyage on which a steel steamer was damaged about her decks, had her wheel chains parted, and her propeller shaft fractured by heavy seas, a leak was discovered around a rivet in the after port bilge. Three-sixteenths of an inch of the outer end of the rivet was gone; the end of the remaining part showed evidence of fracture. This bilge had been sounded daily before the heavy weather began and had been opened and cleaned by the crew before the loading of the cargo. No water was entering it at such times. *Held*, upon evidence of similar loss of rivet-heads in previous cases, probably from excessive vibration through the racing of the propeller in rough weather, that the rivet was fractured by that cause, which was a peril of the sea.

2. Same—Seaworthiness—Inequality in strength of rivets.

The cylindric part of the broken rivet was somewhat oblique to the plane of the inner head, showing that the holes in the overlapping plates through which it had been driven when hot were not perfectly true. Both heads of the rivet had something of a cant. No other was broken. *Held*, that although the cant at both ends might diminish its endurance by subjecting it to an unequal strain, yet, not being a weak or improper rivet, mere inequality in the strength of the rivets would not amount to unseaworthiness or a violation of a charter provision that the ship shall be "tight, staunch and strong."

3. Same—Sea perils—Presumptive cause.

Where it satisfactorily appears that sea perils have been encountered adequate to cause damage to a seaworthy ship, and there is general proof of seaworthiness, the damage is presumptively due to such perils.

4. Same—Injury by sea water—Exception of loss by perils of the sea.

Damage to cargo by sea water entering the hold around a loose rivet, which has been fractured by perils of the sea, is a loss by perils of the sea within the exceptions of a charter party and bill of lading.

5. Same—Diligence in docking for examination—Harter act.

A comparatively new steel steamer, built by first-class makers, which had passed its first Lloyd's survey in February, 1895, when the whole bottom was inspected and the riveting found sound, started on the voyage in question in January, 1896. No accident to the bottom had intervened. *Held*, that reasonable care of a vessel does not require docking for examination more than once a year, in the absence of some known necessity for it, and that accordingly there was no lack of diligence in the inspection of the ship.

6. SAME—CHARTERED SHIP—CLAUSE "ALL CONDITIONS AS PER CHARTER PARTY" IN ENDORSED BILLS OF LADING—EFFECT OF CHARTER EXCEPTIONS—LATENT DEFECT.

The goods were shipped in a chartered ship by the charterers, and the bills of lading contained the clause, "All conditions as per charter party." *Held*, that the receivers of the cargo, as endorsees of the bills of lading, took the goods subject to the provisions of the charter party; that the ship was entitled to the benefit of an exception of "latent defects in the hull" contained in the charter party; and that if there was any defect in the rivet, it was latent, and within the exception.

7. SAME—LEAVING SLUICE SHUT—OPERATION OF HARTER ACT NOT IMPLIEDLY EXCLUDED.

The charter party contained a number of exceptions, including perils of the sea, and a further provision that "nothing *herein* contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by improper opening of valves, sluices or ports, or by causes other than those above excepted." *Held* (1) that the damage was by "a cause above excepted," in the sense of the clause; (2) that the engineer's neglect in leaving the sluice *shut* was not an "improper *opening*" of it; (3) that this clause did not impliedly exclude the operation of the Harter Act or deprive the ship of the benefit of the exceptions therein contained.

8. SAME—HARTER ACT "MANAGEMENT"—LEAVING SLUICE SHUT.

The opening of a sluice gate, designed to empty the bilges, was neglected during heavy weather. The accumulating water overflowed the bilges and damaged cargo properly stowed in the holds. *Held*, that the neglect to open the sluices was a fault in the "management of the ship," within the third section of the Harter Act, and that the ship and owners were exempted thereby from liability for the resulting damage.

Libel by the American Sugar Refining Company against the steamship Sandfield to recover the sum of $10,000 for damage to a cargo of sugar.

Cowen, Wing, Putnam & Burlingham, for Libelant.
Convers & Kirlin, for Claimant.

BROWN, *J.*—The above libel was filed to recover damages to a large quantity of sugar in Nos. 3 and 4 holds of the steamship Sandfield on her voyage from Alexandria, Egypt, to New York, in February and March, 1896. The damage was caused by a great accumulation of sea water. How the water got access to those holds was not known until after the cargo was discharged and the vessel docked, when a defective rivet in the outer plating of the ship was found, leading into the port bilge or sluiceway, about three feet forward of the sluice gate, in the stuffing-box bulkhead, and a few inches below the flooring over the limbers, about fourteen feet below the water line.

The vessel sailed from Alexandria on January 30, 1896. There was no leak of any kind until February 14, four days after passing Gibraltar. On that day weather of extraordinary severity set in, and continued gales were encountered until arrival at the Delaware Breakwater on March 6. In this weather the ship received much injury from the seas; two lifeboats were damaged, one washed away; the winches were damaged, pipes and ventilators on deck carried away, bridge, rails and stanchions bent and broken; the after deck started in two places, the wheel chains parted several times, shackles parted, and the propeller shaft fractured through racing, while pitching in the heavy seas. The leak occurred during this stormy weather. The defects in the rivet, when examined, were sufficient, according to the estimate of Mr. Mancor, the libelant's expert, to fill the port bilge, which was 80 feet long from the sluice gate to the bulkhead forward, in about seven hours. Had the sluice gate leading into the well been opened twice a day during the stormy weather, as was customary at other times, no such accummulation of water would have occurred, as the leak would have been soon discovered in pumping the water from the well, and the pumps were sufficient to prevent any accumulation of water or consequent damage. But the opening of the sluice gates during the heavy weather was neglected; and the accumulating water having overflowed the bilges, gradually engulfed the bags of sugar, and formed within the bilges a candied mass, which at length somewhat checked the leak, but not without a large loss and damage to the sugar.

When the defective rivet was found on docking the ship, it was knocked in, and has been produced in Court.

The cylindric part is somewhat oblique as respects the plane of the inner head, which is intact, showing that the holes in the overlapping plates through which it was originally driven when hot, were not perfectly true, so that both heads must have had something of a cant. The exterior end of the rivet, after being driven in hot, was battered down, so as to fill up the flaring countersink on the outer surface of the ship's plate, extending into the plate about $\frac{3}{8}$ of an inch in depth, and thus forming a clinch or

outer head flush with the plate. The defective rivet proves to be $\frac{3}{16}$ of an inch short, and the countersunk portion, which should be flaring outwards, is gone. The defendant contends that the rivet and the rivet hole were in good order at the time when the vessel sailed; that the outer rivet head or countersunk portion was broken off by fracture, probably through the great vibration caused by protracted racing in heavy weather; that if the rivet was defective at the time of sailing the defect was latent, and therefore within the express exception of the charter under which the sugar was shipped; and that the failure to open the sluice gate was negligence in "the management of the ship," for which, under the Harter Act, the respondents are not answerable.

The libelant contends that the rivet was defective when the ship sailed, and that the damage falls within the express liability created by the provisions of the charter and the bill of lading, and that those provisions supersede the Harter Act in the present case, even if "due diligence" were shown, which, it is claimed, is not proved.

Before considering the terms of the charter and bill of lading, my conclusions concerning some controverted matters of fact should be stated. The clear weight of evidence seems to me to show the following:

(1.) That the exterior end of the rivet to the extent of about $\frac{3}{16}$ of an inch, including all the flaring or countersunk portion, was gone at the time the ship was docked and the defect discovered, *i. e.*, before the rivet was driven out.

The loss of $\frac{3}{16}$ of an inch in length could not have been caused by the two or three blows of the hammer by which the rivet was driven back. Had the rivet been then entire, it could not have been driven back without first cutting out, or breaking off, the flaring portion which forms the clinch or head. It was neither cut nor broken off at that time; and it could not have got into the present shape by rust alone. Had the flange been broken in driving back, or had the flange rusted away, the cylindrical part of the rivet would have shown its full length, or nearly its full length, instead of being $\frac{3}{16}$ of

an inch short; and if broken off, the circumference at the end would naturally also have shown marks of forcible breaking all around, quite different from those which the rivet now exhibits On the other hand the rivet does shows upon the circumference, at the outer end, some toothed marks of rupture, such as would be likely to attend a fracture at the depth of the countersink, viz., $\frac{3}{16}$ of an inch; and I accordingly find that there was such a fracture and loss of the outer end of the rivet to that extent.

(2.) This fracture and the loss of the countersunk portion of the rivet occurred sometime during the heavy weather that the ship encountered, beginning on February 14th, more than two weeks after the ship sailed from Alexandria. This is the necessary inference from the fact that the rivet hole was about 14 feet below the water line, and from the facts (*a*) that prior to the ship's arrival at Alexandria, there had been no noticable leak; (*b*) that no leak was visible at Alexandria, when the limber boards were all taken up and the pockets of the limbers carefully cleaned at the place where the defective rivet was afterwards found; and (*c*) that after sailing from Alexandria, and for 16 days until heavy weather set in, the sluices were open daily and no water was found up to that time, nor on the preceding voyage from Newport to Genoa, when the sluices were opened daily. There is no known cause to which the loss of the countersunk part of the rivet can be ascribed before the heavy weather on this voyage; and if the loss of the rivet head had taken place at some indefinite time before sailing, there would have been some previous leak noticeable. The rivet, it is true, now shows corrosion upon its circumference; but this rust is not greater than is explainable by the action of the sea water on this voyage, particularly when combined with sugar, forming a sugar acid. The corrosion is, in fact, very much less than might have been caused in the same time by this acid infusion in a different situation, as shown by the case of The Alvena, 74 Fed., 252.

(3.) There is not sufficient evidence to warrant me in finding that there was any lack of diligence in the inspection of the ship. The vessel was comparatively new, and built by first-class makers. She passed her first Lloyd's survey in February, 1895, when the whole bottom was inspected and the riveting found sound. No accident intervened. Diligent care of the ship does not require redocking more than once a year, in the absence of some known necessity for it; and at the time of this voyage, a year had not expired since the last docking.

(4.) The excessive vibration caused by long continued racing in heavy weather is adequate to explain the breaking off of the countersink of the rivet. This has been known to occur before; usually with more than one rivet-head broken off. Here there was but one broken This, however, does not discredit the cause in this case, because there is otherwise abundant evdience of the existence of the cause in the long continued very heavy weather, and much other damage to the ship. In the case of the Alvena there was no evidence of the existence of any sufficient external cause (74 Fed., 252, 254-5). But where the existence of an adequate cause of the damage to a seaworthy ship is proved, that is presumptively sufficient to relieve the ship (The Warren Adams, 74 Fed., 413, 416; The Sintram, 64 do., 884). Cases of single rivet heads broken off are in evidence. That only one was broken is evidence of the soundness of the general structure, or that the vibration was not sufficiently violent or long continued to break others. It is also likely enough that the cant given to the rivet by driving it through the overlapping holes which were not quite true, and the cant given to the clinch at both ends might diminish its endurance, by subjecting it to an unequal strain, and increasing the injurious effects of the vibration of the plates against it. If such was the fact, any such mere inequality in the strength of the rivets does not amount to unseaworthi ness, or a violation of the provision of the charter that the ship shall be "tight, staunch and strong."

Upon the above conclusions of fact, it follows that the access of water through the rivet hole arose primarily

from a peril of the sea,; that is to say, from an access of sea water through an accident to a seaworthy ship, arising from extraordinary weather, the consequent racing of the engine, and the snapping off of one of the rivet heads. By the general exception of sea perils, the ship is consequently relieved from liability, unless it further appears from the evidence that the injury arising from the leak might have been avoided by reasonable diligence, or that some special provisions of the contract of carriage preclude any exemption of liability from such a cause.

The evidence leaves no doubt that had the sluice gate been opened twice daily as customary, no damage would have happened, notwithstanding the leak. It is evident, however, that the daily opening of the sluice-ways is a part of the "management of the ship"; and inasmuch as the evidence shows that the owners and their agents exercised "due diligence," the ship and owners are exempted from liability for this resulting damage by the third section of the Harter Act (Act Feb. 13, 1893, 2 Supp. Rev. St., 81-2), unless the provisions of the Harter Act are superseded by the contract, as the libelant claims (Hine *vs.* Bermudez, 68 Fed., 920, 923). Although this act applies to shipments upon foreign vessels transporting cargoes to this country, I have no doubt that shipowners for whose benefit the exemptions of the 3d section were provided may waive these benefits and bind themselves to a more extended responsibility than the statute imposes, if they choose to do so; but no such waiver should be found, except upon explicit proof, or undoubted inference.

The charter-party in this case, after reciting that the ship should be tight, staunch and strong, and in every way fitted for the voyage, provides for the delivery of cargo, but with numerous exceptions, which are stated in Section 4, among which are the following:

"The act of God, perils, dangers and accidents of the sea or other waters of what nature and kind soever * * * any *latent defect in hull and / or machinery*, stranding, collisions, and all other accidents of navigation, and all losses and damages caused thereby are excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants

of the shipowner; but unless stranded, sunk or burnt, *nothing herein contained* shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or absence of customary ventilation, or *by improper opening of the valves, sluices and ports*, or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being *seaworthy* when she sails on the voyage; but any *latent defects* in the hull, pipes or machinery shall *not be considered unseaworthiness*, provided the same do not result from want of due diligence of the owners or any of them, or by the ship's husband or manager."

The 19th clause of the charter provides that

"the Mediterranean, Black Sea and Baltic grain cargo steamer bill of lading, 1885, is to be used under this charter, and its conditions are to form part thereof."

The bill of lading contains the clause "all conditions as per charter-party," giving the date of the charter, and then enumerates substantially the same exceptions as the charter; but as respects *latent defects* it reads that "latent defects *in the machinery* shall not be considered unseaworthiness," &c.; whereas the charter reads, "latent defects *in the hull* and / or machinery, &c."

The shipment in the present case, however, was by the charterers; and the libelants, as endorsees of the bill of lading, took the goods subject to the provisions of the charter-party, inasmuch as the bill of lading expressly recites, "all conditions as per charter-party." The somewhat narrower provision of the bill of lading as respects the hull, therefore, does not exclude the additional provisions of the charter, and the provisions of the charter must, therefore, govern.

The effect of the charter exceptions is largely the same as the provisions of the Harter Act—passed eight years after this form of bill of lading was adopted. By the language of the charter, a latent defect in the hull or machinery is not to be considered unseaworthiness, when, as I find here, there was no want of due diligence. If there was any defect in the rivet, it was a latent defect, as it was not visible upon such inspection as was required

and given, as above found; so that the ship cannot be deemed unseaworthy under the charter (The Carib Prince, 68 Fed., 254).

The negligent failure to open the sluice gate in the heavy weather is clearly covered by the express exception of "perils, dangers or accidents of the sea or other waters * * * and all other accidents of navigation, and all losses and damages caused thereby, even when occasioned by negligence of the master, mariners or other servants of the shipowners."

In effect, this exception, as applied to this case, is identical with the third section of the Harter Act, since the same negligence is a part of the "management of the ship" (The Silvia, 64 Fed., 607; affd., 68 do., 280. The Etona, 64 do., 880).

The subsequent provision of the charter, viz., that "nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned * * * by causes *other than those above excepted*," does not aid the libelant; because the exception of sea perils and of negligence of the seamen in connection therewith is one of the "causes above excepted;" and it was that cause that made the leak operative to the libelant's damage.

The charter contains the further provision:

"That nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned * * * *by improper opening of valves, sluices and ports.*"

There can be no doubt that the opening of valves, sluices and ports during the voyage is a part of the "management of the ship" (The Silvia, *supra*). Damage arising from negligence in this regard, therefore, would fall within the exemption of the Harter Act; though this charter and the bill of lading provide that nothing *therein* shall exempt the owner from liability caused by improperly opening the valves, sluices or ports. The negligence in this case, however, does not fall within the *language* of this qualification. For this damage did not arise from any improper *opening* of the sluice gate, but from the neglect

to open it at all during the heavy weather. The language of this adopted form of bill of lading, and the similar words of the charter, were a subject of such special deliberation that I do not feel authorized to extend it to improperly keeping the valves, sluices and ports *shut*. The danger contemplated from the *improper opening* of valves, sluices and ports, was apparently of a different and much more serious kind, viz., the danger to the whole ship from being thus opened to the sea: making her liable to be quickly sunk, or to great general damage before the fault could be remedied. The probable ground of this particular exception, therefore, forbids its extension by construction to cases beyond its letter and its probable reason.

Even if the effect of this exception in cases coming within it, would be to supersede the provisions of the Harter Act, and to make the ship and owner legally liable for the damage arising from open valves, &c., under their general liability for negligence, as to which I express no opinion, nevertheless, inasmuch as I cannot find this damage to be covered by this clause of the charter and bill of lading, the previous general exceptions, and the 3d section of the Harter Act to the same effect are sufficient to absolve the ship.

The libel must be dismissed, with costs.

No. 45.

Brief of Wheeler with Appellee.

Filed Jan. 25, 1898.

Supreme Court of the United States.

45.

JOSEPHINE W. WUPPERMAN,

Appellant,

vs.

The Steamship "CARIB PRINCE," her Engines, &c.,
ERNEST LEGGE, Claimant,

Appellee.

Supplementary Brief Submitted by leave of this Court in Support of the Decree below.

EVERETT P. WHEELER,
Advocate with the Appellee,
Of Counsel for Atlas Steamship Co.

INDEX

	PAGE.
Statement	1
History of the Harter Act	2
Evils remedied by the Harter Act	11
Policy of Insurance and bill of lading	16
Public Policy in relation to Carriers	17
What are Latent Defects	22
Seaworthiness of the Carib Prince	27
Abstract United States Statutes as to inspection of vessels for the greater security of life and property at sea	33
Abstract British statutes on the same subject	42
Table showing increased security to life and property resulting therefrom	50
Decision of the German Imperial Court of Appeals in the Princess	52

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOSEPHINE W. WUPPERMAN,
Appellant,

against

THE STEAMSHIP "CARIB PRINCE," her Engines, &c., ERNEST LEGGE, Claimant,
Appellee.

No. 45.

SUPPLEMENTARY BRIEF SUBMITTED BY LEAVE OF THIS COURT IN SUPPORT OF THE DECREE BELOW.

Statement

This cause was brought here by *certiorari*. The decree of the District Court, dismissing the libel was affirmed unanimously by the Circuit Court of Appeals. The case is reported in the latter Court, 35 U. S. App., 390, 15 C. C. A., 385, 68 Fed. Rep., 254, and in the former Court, 63 Fed. Rep., 266.

The libel was brought to recover for injury to cargo. This was occasioned by the breaking of a rivet in the collision bulkhead, and the consequent leakage of water from the ballast tank in the forepeak.

The defenses were that the owner exercised due diligence to make the ship seaworthy, and was, therefore, exempt from liability under the Harter Act, that the defect in the rivet was latent, and, therefore, within the exceptions of the bill of lading, and that the defect was not such as to make the vessel unseaworthy.

This brief is submitted on behalf of shipowners not parties to this record, but interested to support the decree. Leave was granted November 1, 1897.

First.

History of the Harter Act.

I.—The Harter Act, as finally adopted, was not hasty legislation. It was the outgrowth of a controversy between shipowners, shippers and underwriters, that had been going on, at least since 1880. This had been brought before the Association for the Reform and Codification of the Law of Nations; before the Chambers of Commerce and Exchanges in the great cities of America, England and Germany. Representations had been made to the British Government in reference to proposed legislation to settle the controversy, and bills with a similar object had been introduced in Congress. The earlier history of this controversy is given in Chapter 3 of Wendt's Papers on Marine Legislation, 3d Edition.

A careful examination of this discussion as to the form of bills of lading will show :

1. That the main controversy has been whether the carrier should be allowed under any circumstances to exempt himself from liability for the negligence of the master or mariners.

2. That no objection has ever been made to exemption from liability for injury caused by latent defects, if the carrier use due diligence to discover and guard against them.

Indeed, it may justly be said that until the decision of this Court in the *Caledonia*, it was generally supposed by commercial men that the carrier was not liable for latent defects in the hull or machinery, which diligence could not discover, even though the word, "latent," was omitted in the bill of lading.

In the various forms of bills of lading which were proposed by the shippers and commercial bodies which they had organized in different cities, a clause is to be found exempting the carrier "from any latent defect in hull or machinery."

> See the New York Produce Exchange Bill of Lading printed in full in Wheeler on Common Carriers, pp. 350–352.

In all the discussions reported in Wendt, no objection is made to this clause.

The clause in the Produce Exchange Bill of Lading, which caused most debate was that which exempted the carrier from liability for losses occasioned by "negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager."

A Congress assembled at Hamburg, in which ship-

owners were not represented, reported that it was inexpedient to recommend the adoption of such a clause. Another, and more representative Congress assembled later in London, reported in the opposite direction. The argument on one side and the other may be briefly summarized thus:

On the part of the shippers it was contended that the shipper had no voice in the selection of the captain and crew, and that the shipowner should therefore be responsible for their negligence, and that this would tend to insure greater caution on his part, and that the carriers had a virtual monopoly of the carrying trade.

On behalf of the carrier it was argued that the selection of the master and mariners was not altogether in his hands, that the governments of the different commercial countries had instituted examinations as to the qualifications of mariners, and that no person could be appointed to a position as officer or engineer who had not passed such an examination; and that there was no such thing as a monopoly of carriage by sea. In this respect transportation by sea differed from transportation by land. No railroad could be built without obtaining a charter from the Government, and without obtaining a right of way in the manner pointed out by law, whereas anyone could become a carrier by sea who had the capital necessary to furnish and equip a ship. In point of fact, a great deal of the carrying trade was in the hands of independent owners, who competed with the great lines. And above all the argument was pressed that there had been a complete change in the conditions under which the carrying trade was conducted; that in the nature of the case the owners of ships could not exercise that personal supervision over persons employed by them that individual owners formerly could, especially when (as was often the case) the captain himself was one of such owners.

No objection was made, during all the discussion, to the insertion of a clause exempting the shipowner from liability for latent defects, provided due diligence was used in the inspection of the ship. The point afterwards raised by the ingenuity of counsel that a "latent defect" meant a defect arising after the commencement of the voyage, was never suggested. Obviously all the disputants assumed that "a latent defect" meant a defect actually existing at the beginning of the voyage, but not discoverable by due diligence. Where a subject has been so thoroughly canvassed as was this, failure to suggest an objection is the strongest possible evidence of approval.

The result of these manifold discussions was the compromise embodied in the Harter Act.

II.—When that Act was introduced in the House of Representatives in 1892, it prohibited the insertion of this latter clause. It was drawn in the interest of shippers exclusively. The exemptions in Section 3 of the bill as introduced, did not help the carrier, for they were substantially those that existed at common law. An amendment to the third section was inserted by the House Committee on Interstate Commerce and Navigation, which also was really in the interest of shippers. That is to say, it allowed the carrier to agree "that the vessel may render services to property in distress afloat, and tow the same to the nearest and most convenient port of safety, without incurring penalties for deviation in rendering such service."

It had been held that in the absence of such a stipulation it would be a deviation to render services for the saving of property at sea.

It may be noted that the only debate in the House, before the bill went to the Senate, took place during the morning hour; that it largely consisted of invective against the

clause common in foreign bills of lading, that the contract should be judged by the law of Great Britain or of some other country named therein, interspersed with collateral remarks as to the advantage of high tariff. It certainly could not be called a serious debate upon the merits of the important questions involved in the bill, and does not throw the slightest light upon the construction to be given to it.

The bill then went to the Senate, and a full and careful hearing took place before the Senate Committee on Commerce. Before this committee appeared the representatives of the shipowners, shippers, and the underwriters. Indeed, all the great commercial bodies were represented. Mr. Frye in reporting the bill to the Senate, stated that in its amended form it had met the approval of all parties in interest, and added: "It had the unanimous agreement, after long hearings, of the Committee on Commerce."

24 Congressional Record, Part 2, p. 1180.

An examination of the amendments reported by the Senate Committee and adopted by the Senate (which were afterwards concurred in by the House) shows that the defect in the language which is to be found in Section 2 as printed in the Statutes at Large (27 Stat. at Large, 445) is an error in engrossing. As passed by the Senate, and finally by the House, the second section read as follows:

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby

the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."

Report of Committee, *Ibid*, 1180.

It is to be observed that when this Court quote the Act in The *Delaware*, 161 U. S., 470, they quote it as as it is thus stated, although the word *to* is omitted in the printed Statutes at Large.

Another case (No. 83) is pending in this Court in which the right of the carrier to limit the amount of his liability is drawn in question. That question does not arise in this case, and nothing further will be said upon it. Irrespective of this, what are the provisions of the Harter Act?

1. The first section prohibits the shipowner from inserting any agreement whereby he "shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery, of any and all lawful merchandise or property committed to its or their charge."

2. The second prohibits the shipowner from inserting any clause whereby his obligation to exercise due diligence to equip the vessel and to make her seaworthy, or whereby the obligations of his servants to carefully handle and stow her cargo, and to care for and properly deliver the same, shall be lessened, weakened or avoided.

The concession by the shipper and underwriter involved in this second section, is a limitation of the absolute warranty of seaworthiness which existed at common law, both as to the shipper and the underwriter.

3. The third section provides that if the owner shall "exercise due diligence to make the said vessel in all re-

spects seaworthy and properly manned, equipped and supplied," neither she nor her owner shall "be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." The clause declaratory of the common law as to perils of the sea, the act of God, &c., is retained, as well as the clause that the vessel may deviate to save property as well as life.

4. The owner is required to issue bills of lading, stating among other things, the marks and apparent condition of the goods shipped.

5. The violation of the statute is made a misdemeanor punishable by fine not exceeding two thousand dollars.

6. The provisions of the statute relating to limitation of liability by the surrender of the vessel and freight are retained.

7. Sections 1 and 4 are declared not applicable "to the transportation of live animals."

It will be seen from this summary of the act that very important concessions were made by all parties. It is not surprising that the result, as stated by Mr. Frye, should have been satisfactory to all parties. The great controlling fact, so far as the present case is concerned, is that no objection was made by any of the parties to the controversy, to a limitation of the carrier's liability for latent defects, provided the owner shall exercise due diligence to make the vessel seaworthy.

III.—The libellant's counsel argues in the second point of his brief that the exemption from latent defects as claimed in this case is contrary to the terms of the second section of the Act, and indulges in some grammatical gymnastics to prove that "due diligence" in that section relates only to the clause "to properly equip, man, pro-

vision and outfit said vessel." The wisdom of the Senate, however, is commended in adding this limitation of due diligence to this so-called "first obligation to properly equip, man, provision and outfit." But it is alleged that the Senate carefully left the duty of seaworthiness unqualified in accordance with the existing law.

Any defect in equipping, manning, provisioning or outfitting a vessel is quite as likely to result in damage to cargo as a latent defect, and the lack of a sufficient number of men or of a sufficiently large quantity of provisions would be much more likely to result in the entire loss of the ship than would some trifling defect in the hull. It is hard to see, therefore, why the same wisdom which applied the qualification of "due diligence" to such duties on the part of the shipowner, should not also extend the qualification to the obligation of seaworthiness. Indeed, so far as the reason for the qualification of "due diligence" goes, if it were to be applied to but *one* class of duties, Congress would naturally select that class which was most difficult of absolute performance, and that is certainly the duty of "seaworthiness." An owner can always know that his ship is properly provisioned and sufficiently manned, and such knowledge is much easier to obtain than it is to find a latent defect. In the former case you know what you are looking for, in the latter you do not.

The very rigor of the requirements placed upon the shipowner, as pointed out by the libellant's counsel, only strengthens the contention that the Harter Act was intended to change them, and it is difficult to see how this intention could have been more plainly expressed in the second section, without making absurd English of it.

IV.—Libellant's advocate has expended all of his force upon the second section of the Act, and seems to have

overlooked the third section entirely. Whatever argument may be indulged in as to the second section it is impossible to make even a plausible argument on the third, and it is under that section that the *Carib Prince* is entitled to exemption. There the requirement of exercising "due diligence" is first applied to making the vessel in all respects seaworthy. It reads:

"Section 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America *shall exercise due diligence to make the said vessel in all respects seaworthy*, and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterer, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel," &c.

A fair consideration of that section alone shows conclusively how the preceding section must be construed, and disposes of the entire argument of the plaintiff. The whole Act should be construed together. No reason can be assigned for a construction of the second section which shall make the warranty of seaworthiness absolute, while under the third only due diligence to make her seaworthy is required.

V.—An old petition of the Glasgow Corn Trade Association is quoted to support the proposition that the exemption of the carrier from liability for a *latent* defect in hull would be an intolerable evil. But this petition makes no such complaint. It complains of a clause exempting the carrier from liability for *all* defects in hull. This would be unreasonable, and is prohibited by the Harter Act. But when the shippers, through their Produce Exchange, formulated a bill of lading, they agreed

to the exemption from liability for "any *latent* defect in hull or machinery."

Wheeler on Modern Law Carriers, p. 350.

And the Harter Act cannot be supposed to have gone farther in its prohibition than the shippers th mselves had thus requested.

Second.

Evils remedied by Harter Act.

I.—One cardinal rule for the construction of statutes is to consider the state of the law before the adoption of the statute, and the evils which the statute sought to remedy.

1. It has for many years been well settled that the rule applicable to the construction of the contract of insurance in case of loss, differs from that which would be applied in the case of an action on a bill of lading.

This distinction in effect was this: That in an action on a policy of insurance, the underwriter would be liable for a loss, the immediate occasion of which was a peril of the sea, although its efficient cause was the negligence of the master and mariners.

2 Arnould on Insurance, 655.
Orient Ins. Co. *vs.* Adams, 123 U. S., 67.
Waters *vs.* Merchants' L. Ins. Co., 11 Peters, 213.
Busk *vs.* Royal Ex. Ass. Co. 2 B. & Ald., 73.

Indeed, it was held by the Supreme Judicial Court of Massachusetts, that an insurance against sea perils would cover a loss occasioned by the barratry of the master, though this was not specified.

Parkhurst *vs.* Gloucester Ins. Co., 100 Mass., 301.

On the other hand, in actions on bills of lading, it was equally well settled that if the efficient cause was the negligence of the master or mariners, the carrier would be responsible, although the immediate cause was a sea peril. The rigor of this latter rule has been somewhat modified in this Court. It has held that the carrier was not liable if the immediate cause of the loss was a peril excepted in the bill of lading, although delay on the carrier's part brought the goods into a place where and at a time when the peril occurred.

Railroad Co. *vs.* Reeves, 10 Wall., 176.

This decision was followed in

The *R. D. Bibber*, 2 C. C. A., 50; 50 Fed. Rep., 841.

In accord with these decisions are

Denney *vs.* N. Y. Central R. R. Co., 13 Gray, 41.

Hoadly *vs.* Northern Transp. Co., 115 Mass., 304.

Michigan Central R. R. *vs.* Burrows, 33 Mich., 6.

But, nevertheless, there were numerous cases, pointed out in these decisions, in which it was held that a carrier might be liable to the shipper for a loss of goods occasioned by the negligence of the mariners, when he himself

could recover upon a policy of insurance upon the vessel, caused by the same negligence.

On the other hand, there were cases of latent defects where the underwriter, having paid a loss upon cargo, was subrogated to the right of the owner of the cargo to recover against the carrier, although neither the latter nor his servants had been negligent in any particular.

2. The question in suits on bills of lading for damage to cargo, is really one of insurance. At common law the carrier was an insurer against all losses except those arising from the act of God or the public enemy. The development of the business of Insurance Companies has greatly increased the security of shipowners. Their policies not only cover losses arising from those perils for which the carrier was not liable at common law, but also many others for which the carrier was liable. This not only gives the shipper a complete remedy, but affords protection against insolvency of the carrier, or his taking proceedings to limit his liability by the surrender of his interest in the ship and her freight then pending. This development produces a condition, not only of greater security, but of greater justice than the common law of carriers produced.

3. There were many instances of great hardship at common law. The carrier often suffered enormous loss, sufficient sometimes to produce insolvency, without any actual fault on his part. No better illustration of this could be furnished than the present case. It is undisputed and indisputable, that in the construction and equipment of the *Carib Prince* no expense or pains were spared. Competent ship builders were employed, and thorough inspection given. The ship was chartered and the charterer engaged the officers and crew. If there was any defect of inspection subsequent to the ship's sailing from England, it was the fault of servants who were never employed by the shipowner. Yet here it is sought to make the owner and the ship responsible for such neglect.

On the other hand there are many cases of gross negligence from which no injurious consequences follow. The effect of the rigorous enforcement of the common law liability of the carrier and of the strict construction of statutes passed for his relief, is therefore subject to two criticisms: It punishes the innocent, and it does not punish the guilty.

Undoubtedly the original tendency of the decisions is shown in some of the quotations on the appellant's brief. A severe responsibility was imposed upon the carrier. The Courts carried to the farthest extent the rigorous warranty of seaworthiness which they implied. As carrying trade has increased and the nations have realized its importance and the greatness of the public benefit which it produces, their policy has been gradually assuming a different form. For years this has been in the direction of more careful inspection and more rigid requirements as to the manning, construction and equipment of vessels. In this way seaworthiness is secured in advance, which is certainly more for the public interest than the imposition of a punishment for the failure to secure it. It is therefore equitable and just and in accordance with public policy that the Legislature, while imposing rigorous requirements upon builders and owners of ships, should provide that if they exercise due diligence to make a vessel seaworthy (which implies by necessary inference a strict compliance with the requirements of statutes as to the manning, construction and equipment of the vessels) they should be relieved from the rigor of the common law warranty of seaworthiness.

In view of the hardship often resulting from the application of the warranty of seaworthiness, the Harter Act introduced a much needed reform. It cannot seriously be contested that its provisions are not as binding upon the underwriter as they are upon the shipper and

the shipowner. In view of the provisions of Section 2, if the Court should construe them in accordance with the arguments before mentioned, which are simply a statement of their plain language, an underwriter certainly could not set up as a defense to an action against him upon policies of insurance upon the cargo, that there was a latent defect in the ship when she broke ground for the voyage, for which the owner would not be liable under this act.

On this same principle, that an Act like the one under consideration is effective to modify all relations to which, by reasonable implication it applies, it is held that in salvage cases the value of the cargo on the salving ship need no longer be considered, because the Harter Act allows deviation for salvage.

The Alaska, 75 Fed. Rep., 430 (Benedict, J.).
The Florence, 65 *Ibid.* 248 (Brown, J.).

II.—Libellant argues that, regardless of the Harter Act, a vessel must be absolutely seaworthy at the time of sailing, quoting from *The Caledonia*, 157 U. S., 124, at page 137:

"As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability, but not the duty of the owner, and do not *in the absence of express provision* protect the shipowner against the consequences of furnishing an unseaworthy vessel."

The fact should not be overlooked that the Harter Act was passed after the decision of the *Caledonia*, and its wording was unquestionably influenced by that decision. By that Act the "express provision" which was absent in the *Caledonia*, was intentionally supplied in Section 3, where it is provided "that if the owner of any vessel * * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned,

equipped and supplied, neither the vessel, her owners, etc., shall become or be held responsible. * * *"

The most important question which the Court has to decide in this case is whether or not the Harter Act has mitigated the severity of the requirement imposed by the *Caledonia*, and that case cannot be cited in this connection to prove that the *Carib Prince* is liable, without begging the question.

Third.

Policy of Insurance and Bill of Lading.

In practice the policy of insurance goes with the bill of lading; and the draft drawn against the proceeds of the goods, on which the banker makes his advances, is secured by both. Sometimes the insurance is expressed to be "with all liberties as per bill of lading," or other equivalent words. But in practice the underwriter, as between himself and the assured, treats the policy as if it were so expressed, and pays the loss and sues the carrier, if he thinks there is any claim maintainable against him. This is what was done in

> The Phenix Ins. Co. *vs.* Liverpool & G. W. S. S. Co.; *The Montana.*
> 22 Fed. Rep., 715, 129 U.S., 397.

Frequently the suit is brought in the name of the shipper, but the underwriter is the real party in interest.

It is certain that as soon as the construction of the Harter Act is settled the customs of commerce will conform thereto. The insurance companies make it their business to insure against risks. This is what they are paid for. Out of this they make their money. If this

Court hold that the true construction of the Harter Act is to limit the absolute warranty of seaworthiness implied at common law, so that it becomes a warranty of due diligence, the risk arising from latent defects, not discoverable by due diligence, will be borne by the underwriters. Such their practice has already become, and such it will continue.

Fourth.

Public Policy.

I.—The quotation is often made from the *Reeside*, 2 Sumner, 567, 575, that "every relaxation of the common law in relation to the duties and responsibilities of the owners of cargo ships, is founded in bad policy, and detrimental to the general interests of commerce."

This statement of Mr. Justice Story, like most universal statements in regard to public policy, is to be taken with many deductions and limitations. It is impossible to say that the policy of one generation must necessarily be the policy of another. Enough has been already said to show that this Court in dealing with cases relating to carriers, as well as other cases, will recognize the force of the ancient maxim: "*Cessante ratione, cessat et ipsa lex.*" This was well expressed by Lord TENTERDEN in

Stone *vs.* March, 6 Barn. & Cress., 551:

"The rule is founded on a principle of public policy, and where the public policy ceases to operate, the rule shall cease also."

In Nichols *vs.* Eaton, 91 U. S., 716, 726,

this Court held that the policy of the English law as to

the right to set apart property for the use of another, free from the claims of his creditors, had been changed by the general tenor of the statutes of various States of the Union, limiting the common law rights of creditors, and would no longer be enforced by American Courts of equity.

So the Court of Appeals of New York in

DeWitt *vs.* Barley, 9 N. Y., 371,

held that the change in legislation in regard to evidence had changed the rule excluding evidence of the opinions of witnesses.

In the case of common carriers, legislation has made great changes. The Act of Congress of March 3, 1851, 9 U. S. Statutes at Large, 635, adopted the rules of the Law Merchant in reference to the limitation of liability of shipowners, to the amount of their interest in the vessel and her freight then pending.

In

The Scotland, 105 U. S., 24,

this Court held that the efficacy of this rule in the United States "depends upon the statute and not upon any inherent force of the maritime law." But it gave a liberal construction to the statute and held that it applied to foreign as well as to domestic vessels. This act has been re-enacted by the Rev. Stat. Section 4282 to 4289.

The language of this Court in Providence & N. Y. S. S. Co. *vs.* Hill Mfg. Co., 109 U. S., 578, 588, in reference to the limited liability act, is especially applicable to the case at bar:

"In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the

courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment."

Of the same statute the New York Court of Appeals said in Chamberlain *vs.* Western Transportation Co., 44 N. Y., 305, 309:

"This is not in any sense a penal statute, nor is it in any way derogatory to natural right, and hence I know of no rule of law that requires that it should be strictly construed. It is true that it changes the common law, but there can be no reason for applying the rule of strict construction to the vast body of statute laws which change the common law. The prior law, whether it be statute or common law, is to prevail, unless the subsequent statute, by a fair and proper construction, repeals or modifies it. This statute is rather a remedial statute. It was enacted to remedy the rigor of the common law, which it was deemed unwise, on grounds of public policy, to continue. It should, therefore, be construed, if not liberally, at least fairly, to carry out the policy which it was enacted to promote."

In pursuance of this liberal policy, this Court has held that the claimants against the shipowner are not entitled to have the amount of any insurance on the vessel or freight, included in the stipulation for value.

The City of Norwich, 118 U. S., 468, 493.
The Scotland, 118 U. S., 507.

II.—In all the cases which have been decided in the Circuit Courts of Appeals and in the District Courts, the

Harter Act has been treated as an act passed in pursuance of wise policy, and to be liberally construed.

The Silvia, 64 Fed. Rep., 607; affd., 15 C. C. A., 362, 364; 68 Fed. Rep., 230.
The Viola, 60 Fed. Rep., 296, 298.
The E. A. Shores, Jr., 73 Fed. Rep., 342.
The Etona, 64 Fed. Rep.,880; Aff'd. 71. *Ibid.* 895; S. C, 38 U. S. App. 150, 18; C. C. A., 380.

This Court is now to decide whether it will enforce the statute of the Congress of the United States as adopted, in the spirit in which it was passed, according to the natural construction of its language, or whether it will by a strained and unnatural construction, limit the benefits which that Act was intended to secure to American commerce. Great Britain and the nations on the Continent of Europe allow the insertion in bills of lading of clauses similar in effect to that now contended for. The final debate on the Harter Act in the House shows that the Act was passed in view of this fact, and to give to American commerce the same freedom of contract enjoyed in other countries.

24 Cong. Record, Part 2, pp. 1291, 1292.

III.—The question of policy was certainly one that Congress could determine, and has, we think, determined. But if this question were now to be determined by this Court, should it not hold that prevention is better than punishment? The common law undertook to prevent carelessness in the equipment of vessels by the owner, by a pecuniary mulct whenever injury was caused by such carelessness. Modern legislation undertakes to prevent negligence by rigorous requirements as to the construction of vessels, by careful inspection of them from time to time by official inspectors, and by a rigid examination of the officers and engineers of sea-going vessels. The rigor of these requirements has been progressively in-

creased both in England and this country. The carrying trade of England is far in excess of that of all other countries in the world, and Parliament has not been backward in recognizing this fact and in exacting from shipowners and shipbuilders, full peformance of the duty which this great commerce imposes.

An abstract of some of the American and English statutes on this subject is appended to this brief.

IV.—It is argued that the bill of lading "is the measure of the responsibility, but not of the duty," of the carrier. The duty is fulfilled when all reasonable diligence is used. It is a matter of public interest, and is enforced specifically by legislation.

The result of the legislation on this subject, enforced as it has been by the enterprise and public spirit of the great shipbuilders and shipowners, has been to produce a remarkable decrease in the loss of life and of property at sea and to give to travelers by sea a far greater security than the former policy of the law produced. Every ocean traveler, whose experience covers twenty years knows something of the improvements in steamers. The analysis of official reports, which is given in the appendix to this brief, shows the satisfactory and remarkable results.

Thus it has turned out that the experience of a whole generation is wiser than Mr. Justice Story, and that the method which he thought best has proved to be inadequate, while another, which he never thought of, has been developed and applied. It might as well be said that no method of propulsion or construction of vessels would ever be discovered that should be better than the clippers of Judge Story's time, as to say that public policy in reference to common carriers could never be wisely changed. He knew nothing of collision bulkheads, of twin screws, of

iron and steel ships, or of the statutes for the inspection and examination of ships before and after they are completed.

Indeed when that learned lawyer and great Judge died, the propulsion of vessels by steam was in its infancy, and seagoing vessels were usually owned by individuals, and commonly commanded by one of the owners. The enormous development of the carrying trade in the last fifty years has led to different legislation and a different policy. It was well enough for him to enforce caution in the only manner which lay within his power, but a better method has now been devised. There would certainly seem to be little justice in refusing at the present day, to allow a shipowner to exempt himself from defects which can not be brought to light by the system of Government examiners, and by the many precautions which he is forced by law to take. It would certainly be poor public policy to make the carrying trade so hazardous as to drive people out of it, or discourage the investment of capital in it.

Fifth.

What are Latent Defects.

I.—The libellant claims that latent defects can mean only such as could not have been originally discovered, even by the shipbuilder, and that "defects must exist which no skill can detect, and the effects of which no foresight can avert." If this argument is logically carried out, it must mean that even if a ship has changed hands a dozen times the last owner is responsible for defects which might possibly have been discovered at the time of construction, but which he can only discover by tearing the ship to

pieces. If such is the law there is no safety for the purchasers of ships, no matter how careful they may be. They could never know whether they were laying a basis for future profits or future liabilities. The old maxim of "*caveat emptor*" would become applicable in a very new sense. Moreover, there is no such thing as a defect which "*no* skill can detect and the effects of which *no* foresight can avert." An owner can always hire an expert to tear his ship to pieces. The *Caledonia's* shaft might have been subjected to such a test strain that the flaw would have been exposed.

To prove the validity of the above definition of latent defects cases are cited, in which it is claimed that this is the well-settled definition. But they do not support the proposition.

Indeed, the libellant's advocate throughout his entire brief has sought to prove his contention by the use of the briefest possible quotations, many of them from insurance cases, in which of necessity the rulings would be different from cases of the present nature. His position is proved by these citations in the same way that any proposition, good or bad, could be upheld by the best authority in the world, if isolated sentences were to be taken without regard to the facts of the case in which they were stated, or the context in which they appear.

II.—When the locomotive was invented and the liability of the carrier of passengers by land became the subject of consideration, Courts were much impressed by the danger to which this new method of propulsion exposed the lives and limbs of passengers. They did not apply the rule which had for centuries made the carrier of goods an insurer against all damage except that caused by the act of God or the public enemy. But they did establish what was avowedly a very rigorous rule; to wit, that the car-

rier of passengers was liable for all injuries against which the highest degree of human skill and foresight could have guarded. This rule was not based upon any definition of the phrase "latent defects." It did not deal with the question as to freedom of contract. It was the law governing the carrier's liability in the absence of a special contract. It was based upon the necessity of protecting life and limb. Hence these decisions do not touch the point. We are dealing with a contract of exemption from injury caused by latent defects. We have already shown that the Harter Act does not make this illegal. And we must now consider what it means.

In the Century Dictionary the phrase under consideration is thus defined:

"LATENT.—Hidden, concealed, not visible or apparent, not manifested."

It quotes among others the following:

"To evoke the *latent* genius of the nation, and to direct it to the spheres in which it is most fitted to excel, is one of the highest ends of enlightened statesmanship."—Lecky, England in Eighteenth Century, 111.

"LATENT FAULT, in *law* a blemish or defect in goods purchased which was concealed from or not observable by the buyer before acceptance of the goods."

In none of these definitions and illustrative quotations is the suggestion made that "latent" means that which cannot be discovered by any amount of investigation. Literally the word means hidden. It is implied in the ordinary use of the term, that what is hidden may be discovered. In the quotation from Lecky, this is done by the genius of the statesman. In all the quotations there is the suggestion of a possible discovery. In short, latent means that which is concealed, but may possibly be discovered; although ordinary observation would fail to bring it to light.

III.—The act prohibits a clause lessening the obligation to use due diligence. The proof shows this was used. In short, to sustain the exemption so far as the Bill of Lading is concerned we need only to show that the defect was concealed. To sustain it under the Act of Congress, we must prove that it was not discoverable by due diligence.

The latter is proved by the original and most thorough inspection in London in the spring of 1893, and by a less thorough, but equally careful examination by the Chief Engineer Keeys, in August, 1893, after the hurricane (pp. 44, 45, fols. 130–133). He says the defect was not "discoverable by inspection" (p. 45, fol. 133).

IV.—The argument is presented that "latent" means that which had no existence at the beginning of the voyage, but was caused afterwards by a sea peril, like the straining of a mast, by a storm, invisible externally. To this we reply:

(*a.*) No exemption by contract is needed for injury from such a source. It would be a loss caused by a sea peril, for which the carrier would not in any case be liable.

(*b.*) This construction does not deal with the contract as made. It makes one. It adds qualifying words not in the contract at all. The words used are "Accidents to or latent defects in hull." A defect is just as latent at the beginning of the voyage as when it is caused by a subsequent injury. Latency is one thing, time when it is caused is another and quite a different thing. A Court has power to declare a contract invalid. It has no power to make a contract for the parties. Yet that is what libellant must do to succeed in this contention.

(*c.*) The implied warranty of seaworthiness extends to the time when the vessel actually breaks ground for the

voyage, and not merely to the time when she begins to take in cargo. The libellant's quotation from

The Eugene Vesta, 28 F. R., 762,

states this proposition. Mr. Justice BROWN there said:

"The theory of the law is that the implied warranty of seaworthiness shall protect the owner of the cargo until his policy of insurance commences to run."

To the same effect is

Bowring *vs.* Thebaud, 56 F. R., 520.

The exception of liability for latent defects relieves the shipowner from the implied absolute warranty of seaworthiness, and if the implied warranty, without the exception, would attach immediately on placing the goods on board, a reasonable construction of the exception can only be that it, too, was meant to become operative at the same time. No owner realizing that his liability upon an implied warranty of seaworthiness began when the first bale of goods was placed upon his ship, would make a contract whereby his exemption from that liability was only to begin several days later.

V.—The bill of lading is attacked as an "incoherent and illogical document," "careless and slovenly"; and, therefore, presumptively, to be disregarded. But, whatever justice there may once have been in this criticism upon old forms of bills of lading, it can have no application to the form in this case which is the result, as has been shown, of most careful consideration on both sides. The shippers have formed corporations, and have the power that comes from united action. They have appealed both to Courts and Legislatures, and obtained bills of lading satisfactory to themselves, carefully drawn, and explicit in language.

Sixth.

Seaworthiness of the Carib Prince.

The argument thus far has proceeded on the assumption that the *Carib Prince* at common law would have been held to be not seaworthy. It is desirable certainly that this Court should express in this case its opinion upon the question arising on that assumption. But we do not at all admit that the *Carib Prince* was not seaworthy.

I.—Seaworthiness is defined by this Court to be "fitness to perform the voyage which her owners had undertaken that she should perform safely, with the exception of the unavoidable dangers of the river and of fire."

The Northern Belle, 9 Wall. 526, 529.

In the *Caledonia*, 157 U. S., 124, the Court quote with approval (p. 131) the statement by Parsons, 1 Marine Ins., 367:

"Every person who proposes to any insurer to insure his ship against sea perils, during a certain voyage, impliedly warrants that his ship is in every respect, in a suitable condition to proceed and continue on that voyage, and to encounter all common perils and dangers with safety."

Under these definitions the *Carib Prince* was seaworthy. Even assuming that the rivet was broken when she sailed from Trinidad, she was undoubtedly sound for the voyage. The defect, if it existed then in the rivet, was not a defect that interfered in any way with her being tight, sound and staunch for the voyage.

To amount to unseaworthiness a defect must be such that the vessel is really not worthy, in the judgment of a reasonable man, to go to sea. Every little defect does not make a vessel unseaworthy, even though it may result in

damage to the cargo. For instance, suppose that the fresh water tank of the *Carib Prince* instead of the ballast tank had been defective, a leak in it might well have injured some of the cargo, just as the leak in a small tank in a passenger's stateroom might injure his baggage. But neither of these leaks, nor the actual one in the ballast tank of the *Carib Prince* would have rendered the ship unfit for navigation. The most that could have happened was that the tank should have been emptied, and its entire contents run through hold No. 1. It would then have worked its way into the bilges, and been removed by the pumps, without at any time or in any way endangering the existence of the ship, or rendering her difficult to manage. In other words, no defect can be said to render a vessel unseaworthy unless the maximum amount of damage which can be caused by that defect would render the vessel unseaworthy. Defective plating, an insufficient crew or an incorrect compass render a vessel unseaworthy, only because with such defects she cannot be safely navigated.

The decision of the German Imperial Court of Appeal in Civil Cases in the *Princess*, of which a copy is annexed, supports the proposition just stated.

The injury to the cargo was caused by the act of the Master in pumping water into the fore peak. This act of his was not necessary in any respect for the safety of the ship. It was simply availing himself of a convenience that had been provided in the vessel. The proposition may be tested by the question, Would the vessel have been seaworthy if she had not been provided with a ballast tank in the fore peak? Obviously, she would. It no doubt might be sometimes convenient, and tend, as the captain testified, to produce a better speed, to trim the ship by the addition of water to this ballast tank. But it cannot be said that a failure on

the part of the captain to fill this tank before the ship sailed made her in any respect unseaworthy. The case is really analogous to the porthole cases which have been decided in England and this country, and in which the Courts of both countries have agreed. It has been held that if a vessel sails with an open porthole she is not therby rendered unseaworthy, provided that the state of the weather at the time she sails is such as to make the opening of the porthole convenient and proper. The duty of the master would be to cause the porthole to be closed if bad weather should ensue. But the fact that the porthole was open at the time of sailing, when there was no bad weather, does not make her unseaworthy.

The Silvia, 15 C.C. A., 362, 68 Fed. Rep. 230.
Steele *vs.* Steamship Co., 3 App., Ca., 72.

So in Headley *vs.* Pinkney & Sons, S. S. Co., App., Ca. (1894) 222, the House of Lords held that a vessel which had on board when she sailed, appliances suitable to protect an opening in the bulwarks, was not rendered unseaworthy by the failure of the master to put them up.

II.—In the case at bar it is clear that the vessel was seaworthy when she broke ground upon her voyage. When such is the case it is equally well settled that the warranty of seaworthiness does not extend to her subsequently becoming unseaworthy, even though this be caused by the negligence of the Master. The rule is thus stated in

Arnould on Insurance, Vol. 2 pp. 640, 642:

"It is enough to satisfy this warranty if the ship be originally seaworthy for the voyage insured when she sails on it. There is no implied warranty that the ship shall continue seaworthy in the course of it. 'Every ship' says Lord MANSFIELD, 'must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage.' * * * *

"It makes no difference whether the state of unseaworthiness be occasioned by the negligence of the master and crew or of other parties employed by the assured upon the business of the ship in the usual course of trade."

III.—Libellant's counsel has disregarded the testimony that the bolt may have been crystalized by hammering, which would make the defect a latent one even within his own construction, and argues at great length from the testimony which it is alleged proves that the broken bolt was improperly put in place. That testimony, however, and the lurid quotation in the appendix, are of absolutely no force when construed in connection with other facts in the case.

Had the break in the bolt been caused by the fact that the bolt holes in the plates of the bulkhead did not coincide, the break would have been at the centre of the bolt, and not at the end. When the red hot bolt was welded, any weakness in it must have been developed on the plane where the plates touched, as that would have been the point of the smallest area, and when any strain was brought to bear against the plates, if this lack of coincidences in the holes was increased, the result would have been that in changing their position, even slightly, the two plates would have acted like blades of shears, and cut the bolt off clean, as frequently happens when a vessel goes on the rocks. In this injury, however, the welded head of the bolt was snapped off at the end and the bolt was not cut in two at the centre. That fact indicates most clearly that when the tank was being filled, the momentum of the water thrown against the bulkhead by the pitching of the ship sprung the entire bulkhead inward towards hold No. 1. Such a bend in the plane of the plates would of necessity tend to draw the bolts to a greater length, and break off the welded heads when the limit of elasticity was reached. In this connection it is a very significant fact that the

bolt broken in this case was the one in the row farthest from the side of the ship, where the springing of the plates would have been through the greatest distance, and the consequent pressure brought upon this bolt more severe than that upon any of the others nearer the side of the ship. It is only in this way that such a fracture of this bolt could have been made. In view of Congdon's evidence that he has seen an entire bulkhead knocked flat upon the ship's bottom when a tank was filled at sea, this broken bolt becomes the most natural result (p. 133, fol. 398).

But even granting all of the facts urged by the libellant that the bolt was defective, and that the bolt holes in which it was placed were imperfect, the testimony remains unquestioned that this bolt was, in spite of those facts, stronger than was required by *Lloyds' Register*, and capable of standing a greater strain than any master had a right to put upon it. The libellant's own contention, and that of W. Clark Russell, is to the effect that the strength of the bolt was lessened when it was driven in. Nevertheless it was still strong enough to stand the water test which was applied, in which the pressure was greater than it could ever be with the tank absolutely full. There is no force whatever in the argument that it should have been still stronger, because the required strength had been already surpassed.

IV.—If the Court is to hold that the *Carib Prince* was unseaworthy when she sailed, on the ground that this bolt was in a damaged condition at that time, the result of such a decision should be clearly understood. For instance, in the case of this voyage, suppose that when the *Carib Prince* was one day out, she had caught fire, and the entire cargo had been destroyed. According to the libellant's contention, the insurance policies upon the entire cargo

could have been cancelled, upon the ground that the warranty of seaworthiness was broken at the time of issuing the policies. There is no such thing as unseaworthiness as to one hold of a ship and seaworthiness as to the rest of her. It must seem absurd to the Court that the contagion—so to speak—of this one bulkhead, could spread in such deadly fashion to the entire cargo, most of which could never have been affected by it under any circumstances, and none of which could have been injured but for the mismanagement of the captain in filling his tank at sea.

V.—The libellant's argument that to prove the safety of the tank it should have been filled before the vessel started upon her voyage shows only that the Master was certainly negligent in filling the tank at sea, when such a test had not been made. If the tank had not been filled a defective bolt in the bulkhead could not have caused injury to the cargo. His act, therefore, in so filling the tank, was the proximate cause of the injury. And the Harter Act excuses the vessel from liability for negligence in the captain's management. It is still good law that *causa proxima, non remota spectatur.*

Seventh.

The decree of the Circuit Court of Appeals should be affirmed with costs.

EVERETT P. WHEELER,
Advocate, with the Appellee.
Of Counsel for Atlas Steamship Co.

Appendix.

STATUTES OF THE UNITED STATES IN REFERENCE TO THE PROTECTION OF PASSENGERS AND FREIGHT ON SHIPS.

Revised Statutes of the United States.

(*Edition of 1875.*)

Titles 48, 49, 50, 52.

Sections 4252–4277 concerning *the Transportation of Passengers and Merchandise* were repealed by the Act of 1882, *22 Statutes at Large 186* (repealing clause on p. 191).

These sections are re-enactments of statutes passed at various times between 1855 and 1866; and contain numerous requirements for ensuring the safety of life and property at sea, which are not here stated at length, because such requirements are more amply enacted in 1882.

The following is an abstract of the latter Act:

An Act to regulate the carriage of passengers by sea.

Sec. 1.—(1.) Masters of steamship or other vessel, taking emigrant passengers or other than cabin passengers from foreign country (ports and places of foreign country, contiguous to United States excepted), are not allowed to bring such vessel or passengers to any place in United States unless below specified room space, accommodations, &c., be furnished the passengers for the entire voyage.

2. Space required.

(*a*) in *steamship*—100 unobstructed cubic feet per passenger—on main or first deck below main—and 120 unobstructed cubic feet per passenger on second deck below main—not lawful to carry passengers on any other decks.

(*b*) in *sailing vessels*—110 unobstructed cubic feet per passenger—to be carried only in deck below main deck or in a poop or deckhouse constructed on the main deck.

(*c*) Between decks or compartments, &c.—in which passengers are carried must not be less than *6 feet* high.

(*d*) Children under one year not counted as passengers—two children between one and eight counted as one passenger.

3. Penalty for violation.

Sec. II.—(1.) Every vessel shall have sufficient number of berths for the proper accommodation of all passengers.

(2.) On each deck and compartment not more than 2 tiers of berths; each berth 2 feet wide and 6 feet long (and other details providing for comfort).

(3.) Provisions for separate *male* and *female* compartments, family compartments, berths numbered, berths to be inspected, &c. Penalty for violation.

Sec. III.—(1.) Adequate provision for light, air, ventilation—form and number of ventilators, hatchways, companion ways, caboose, cooking-range and other cooking apparatus; sufficient water-closets. Penalty for violation.

Sec. IV.—Wholesome food, with reasonable quantity of fresh provisions (= to 1½ U.S. Navy rations) with not less than 4 quarts of water, 3 meals per day. Penalty for furnishing short allowance (except in case of accident). Penalty against master for violation; this does not affect civil responsibility of master and owners to passengers.

Sec. V.—Properly built and secured hospital compartments (1 male and 1 female) required, to be located in upper part of ship. Vessel bringing passengers other than cabin passengers—over 50—must have duly-qualified surgeon, with medicines, appliances, &c., to treat any passenger or children of passengers. Penalty for violation.

Sec. VI.—

(1.) Master authorized to maintain good discipline, and such habits of cleanliness as conduce to health, and in consequence shall cause his regulations to be posted up, and so to remain in accessible places in the vessel.

(2.) Compartments of passengers to be cleaned and disinfected.

(3.) Passengers and bedding to have clear and sufficient space on main deck set apart for their airing and exercise. Penalty for violation.

Sec. VII.—

(1.) Officers, seamen, &c., prohibited from visiting passengers' compartments without permission of master. If they do, they are punishable.

(2.) Master who permits them, except for performing a necessary duty in their official capacity, punishable.

(3.) Notice to this effect must be posted. Penalty for violation.

Sec. VIII.—Explosives, vitriol and other articles likely to endanger the lives or safety of passengers, vessel, animals, &c., not allowed to be carried except in vessels of iron in compartments divided off by water-tight bulkheads extending to upper deck. Penalty, &c.

Sec. XI.—Collector of customs of collection district or surveyor of port may direct inspection of vessel, passenger list, compartments, &c. : to be forwarded to Secretary of Treasury where and how he shall direct.

Sec. XIII.—The fines and penalties imposed upon master for violation of above provisions are liens upon vessel, and vessel may be libeled in U. S. Court.

Revised Statutes, § 4278-4280.—Prohibition and regulation of nitro-glycerine carriage. Not allowed on board passenger vessels.

TITLE LII.

Regulation of Steam Vessels.

Sections 4402-4403. Qualifications, appointment and duties of Supervising Inspector-General *i. e.*, preside at meetings, superintend administration of steamboat inspection laws, receive all reports of inspectors, examine accounts and report fully at stated periods to Secretary of Treasury upon all matters pertaining to his office, and secure correct and uniform administration of inspection laws, rules and regulations.

4404. Qualifications and appointment of Supervising Inspectors. They shall be experts in steamboat affairs.

4405. Meetings of board, assignment of districts.

4406. Supervising Inspector shall watch over all parts of territory assigned to him, shall deal with action of local boards of inspectors within his district, and shall instruct them in their duties, and shall visit (when he thinks expedient) vessels licensed, and examine their con-

dition to find out whether provisions of this title have been observed and complied with by (1) Board of Inspectors; (2) by master and owners.

4407. Whenever Supervising Inspector finds that provision has been violated, he shall report (1) to local board, or (2) cause negligent party to be prosecuted, or (3) report to Secretary of Treasury if he thinks official has been negligent.

4408. Supervising Inspector to see that local board executes its duties, and (Sec. 4409) supervise and inspect in districts where no local board exists.

4417. "The local inspectors shall, once in every year, at least, upon application in writing of the master or owner, carefully inspect the *hull* of each steam vessel within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has *suitable accommodations for passengers* and the crew, and is in condition to warrant the belief that she may be used in navigation as a steamer with safety to life, and that all the requirements of the law in regard to fires, boats, pumps, hose, life preservers, floats, anchors, cables and other things are faithfully complied with; and if they deem it expedient, they may direct the vessel to be put in motion, and may adopt any other means to test her sufficiency and that of her equipment."

4418. Local inspectors shall inspect the boilers of all steam vessels (1) before the same shall be used, and (2) once at least in every year thereafter. They shall inspect all the details of the boilers, furnaces, appurtenances, etc., and shall satisfy themselves that such boilers, machinery and appurtenances may be safely employed in the service pro-

posed in the written application without peril to life. They shall inspect safety valves, gauge-cocks, steam-gauges, low-water-gauges, proper insertion of fusible metals, adequate provision for ample water supply, means for blowing-out provided. They shall subject the boilers to the proper hydrostatic tests. No boiler or pipe nor any of the connections therewith shall be approved which is made in whole or in part of bad material, or is unsafe in form or dangerous from defective workmanship, age, use, or other cause.

4419. Inspectors must take absolute control of steam registers, and may take absolute control of one of the safety valves.

4420. Amount of steam pressure allowed freight boats on Mississippi river.

4428–4437. (4429, amended, 22 St., 310; 4430, amended, 28 St., 28; 4434, amended, 28 St., 690.) Provide for construction of boilers, with plates stamped in accordance with the provision of this title, provide punishment for improper construction, require special kind of inspection of boiler plates, require certain stamps on the plates, punish counterfeiting of such stamps, states steam pressure allowable in proportion to the boiler plates, specify thickness of the boiler plates and space between the flues, provide for feed and connecting pipes, for safety valves, fusible plugs, etc., and punish for obstructing safety valves.

4438–4449. (4438, 4441, 4442, amended by 18 St., 30). Providing that alien who has declared his intention to become a citizen of the United States may be licensed as engineer or pilot; treats of the licensing of ship officers.

4438. Boards of local inspectors shall license and classify the masters, chief mates, engineers and pilots of all

steam vessels. Unlawful for person not so licensed to serve as such officer, and penalty of $100 for each offense.

4439. For license of master, inspector inquires as to applicant's character, examines him as well as proof he produces. He must be satisfactory in respect to capacity, experience, habits of life and character. Licensed for one year, liable to revocation on proof of incompetency of any nature.

4440. For license of chief mate, same methods, time of licensing and power of revocation as for master. Examination specially directed to his ability in lading cargo, handling and stowing freight, in navigation and managing steam vessels.

4441. For license of engineer, same as in 4439, 4440. Specially examined in knowledge of steam machinery, experience as engineer. License same time as for above officers. Engineer assigned to class for which he is fitted. If he be negligent or unskillful, inspectors may revoke and assign him to lower grade of engineer if he be fitted therefor.

4442. For license of pilot, regular procedure as for previous officers.

4448. All officers licensed as herein shall assist the inspectors in their examination of any vessel to which such officers belong, and shall point out and report defects. In default thereof license to be revoked.

4450. Local boards of inspectors shall investigate judicially, and with all the incidents of judicial procedure, acts of incompetency or misconduct of the officers.

4453. Local inspectors shall examine at proper times in addition to the annual examination, and serve notice for repairs, etc., when needed.

4462; Secretary of Treasury to make such regulations as may be necessary to secure the proper execution of this title.

Title LII, Chap. II.

Transportation of Passengers and Merchandise.

Section 4463. No steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers and full crew, sufficient at all times to manage the vessel.

4464. Inspectors shall state in certificate of inspection number of passengers of each class that steamer has accommodations for, and can carry with prudence and safety.

4470. Ships to be provided with pipes attached to boiler, woodwork to be covered with incombustible material, etc., to provide against fire.

4471. Fire pumps and hose to be provided.

4472. Articles *very easily* ignitible, *e. g.*, loose hay, loose cotton or hemp, nitro-glycerine, etc., not to be carried on passenger vessels. Articles ignitible, but not to so great a degree, must be stowed in incombustible chests, etc., away from heat or friction. Board of Supervising Inspectors may make other provisions to guard against fire.

4473. Penalty and seizure and sale as punishment for unlawfully carrying cotton or hemp.

4475. Dangerously explosive and combustible articles to be securely packed, distinctly marked and separated.

4476. Penalty and criminal punishment for packing and shipping such articles otherwise than as directed.

4477. Watchmen to be kept at night to guard against

fire, &c., and to give alarm in case of accident or disaster.

4478. Penalty and revocation of license for neglect to keep watchmen.

4479. Fire extinguishers may be required by supervising inspectors.

4480. Wire tiller ropes (or iron chains or rods), bell-pulls, tubes, &c., required.

4481. *River steamers*—Required to have boat with lines, &c., ready for use, and when required; also metallic life boats—also (4482) life-preservers for every person on the boat—also (4483) fire-buckets, axes, water-barrels, &c.

4484. Vessels carrying passengers on maindeck shall be provided with permanent stairways and other means to allow escape to upper deck—also gangways or passages through freight stowed on main deck.

4485. (Am. 27, Stat. 16). Captain or mate shall assign to all main-deck passengers the space on deck they may occupy during the voyage, and such space must be kept clear of freight. Freight shall not be placed so as to interfere with the engineer in his work. (4486.) Penalty for violating 4484 and 4485.

4487. River steamers to be anchored when navigation unsafe.

4488. Life boats, &c., on ocean, lake and sound steamers and (4489). Penalty for so neglecting (Amd. 27, Stat. 16). Ocean and Great Lake steamers must have not less than three water-tight cross bulkheads.

4491. Instruments, equipment, &c., for better security of life as provided by this Title must be first approved (1) by Board of Supervisors, and (2) Secretary of Treasury.

4492. Barge in tow *carrying passengers* subject to provisions of this Title.

4493. "Whenever damage is sustained by any passenger or his baggage from explosion, fire, collision or other cause, the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured to the full amount of damage if it happens through any neglect or failure to comply with the provisions of this Title or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence or wilful misconduct of any master, mate, engineer or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer or pilot and recover damages for any such injury caused by any such master, mate, engineer or pilot.

4494–4500. Referring to publication and enforcement of this title by penalties, &c.

ABSTRACT OF ENGLISH STATUTES REFERRED TO AT PAGE 21 OF FOREGOING BRIEF.

The Merchant Shipping Act of 1854.

17 and 18 Victoria, Chapter 104.
Abbott on Shipping (13 Eng. Ed.) p. 911.

PART I.—Extends the jurisdiction of the Board of Trade. Section 6 is as follows (p. 913):

"The Board of Trade shall be the Department to undertake the general superintendence of matters relating to merchant ships and seamen, and shall be authorized to carry into execution the provisions of this act, and of all

other acts relating to merchant ships and seamen in force for the time being, other than such acts relating to revenue."

PART II.—Requires the registry of British ships, their measurement, ownership, etc.

PART III.—Provides regulations relating to masters and seamen. The number of seamen on each vessel must be reported. Examinations are required of masters and mates (Sect. 131); and a vessel cannot put to sea till their certificates are produced (Section 136). Methods of apprenticeship are provided (Section 141). Whenever a seaman is discharged the master must report his conduct, character and qualifications to the Board of Trade (Sec. 176).

PART IV.—Safety and Prevention of Accidents.

Life boats and buoys are required (Sect. 292). Compasses must be examined in accordance with regulations of the Board of Trade Fire hose must be provided (Sect. 301).

Shipwright and engineer surveyors are to be appointed by the Board of Trade to survey passenger ships (Sect. 305) and such survey shall be made in accordance with regulations and under the direction of the Board of Trade (Sect. 307). The owner half yearly (Sect. 311) must have every passenger steamer surveyed by such shipwright and engineer surveyors (Sect. 309). The declaration of the surveyor must contain a statement (1) that the hull is in good condition; (2) that the partitions, boats, life-buoys, lights, signals, compasses and the certificates of master and mates are such and in such condition as required by this act; (3) the time for which said hull and equipments will be sufficient; (5) the number of passengers which the ship should carry.

The declaration of the engineer surveyor shall state (1) That the machinery is proper for the service and in good condition. (2) The time for which it will be sufficient. (3) That the safety valve and fire hose are in proper condition. (5) How long the machinery will be in proper condition (Sect. 309). The Board will give a certificate embodying the return of a Surveyor (Sect. 312), which must be placed in a conspicuous part of the ship (Sect. 317). The ship must not proceed on her voyage without a certificate. A penalty is provided for carrying more passengers than allowed by the certificate (Sect. 319).

Accidents must be reported to the Board of Trade (Sect. 326).

The Passenger's Act. 1855.

18 and 19 Vict., 119,

Abbott on Shipping, 13 Eng. Ed., p. 1053.

Regulates the space allotted to passengers, with a penalty for carrying more.

Regulates the equipment of passenger ships, with a penalty for violating these requirements

A passenger ship must be manned with an efficient crew to the satisfaction of the emigration officer.

Cattle and certain articles forbidden as cargo and ballast. Stowage of cargo and ballast must be approved by emigration officer.

Merchant Shipping Act, Amendment Act. 1862.

25 and 25 Vict., C. 63.

Abbott on Shipping, 13th Eng. Edit., p. 1085.

Engineers are required to obtain certificates similar to those of masters and mates (Sect. 5).

Chain Cables and Anchors. 1874.

37 & 38 Vict., C. 51.

Abbott on Shipping, 13th Eng. Ed., p. 1139.
Chains and anchors to be tested before sale (Sec. 3).

Merchant Shipping Act, 1876.

39 & 40 Vict. C., 80.
Abbott on Shipping, 13th Eng. Ed., p. 1141.

"Sect. 4. Every person who sends or attempts to send or is party to sending or attempting to send a British ship to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, shall be guilty of a misdemeanor, unless he proves that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purposes of giving such proof, he may give evidence in the same manner as any other witness.

Every master of a British ship who knowingly takes the same to sea in such unseaworthy state, that the life of any person is likely to be thereby endangered, shall be guilty of a misdemeanor, unless he proves that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purposes of giving such proof, he may give evidence in the same manner as any other witness."

"Sect 5. In every contract of service express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship and the master and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when

the voyage commences, and to keep her in a seaworthy condition for the voyage during the same; provided that nothing in this section shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state, where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable."

When a ship is believed to be in a condition dangerous to human life, the Board of Trade may order it to be detained and surveyed. If unsafe she may be ordered permanently detained or until certain repairs are made. Order of detention must be served on the captain of the ship. If he thinks it unjust he may appeal to a Court of survey constituted by this Act (Sections 6 and 7).

Where a foreign ship in the United Kingdom is unsafe because of excessive or improper loading, the above provisions as to inspection and detention shall apply (Section 13).

Any vessel arriving in a port of the United Kingdom from any port out of the United Kingdom between the last day of October and the sixteenth day of April, if it carries timber or heavy wood goods on deck, or light wood to a greater height than three feet above deck, shall be liable to a penalty (Section 24). The deck lines of every vessel must be conspicuously marked (Section 25).

"Sec. 26. With respect to the marking of a load line on British ships the following provisions shall have effect:

1. The owner of every British ship (except ships under eighty tons register, employed solely in the coasting trade, ships employed solely in fishing, and pleasure yachts) shall, before entering his ship outwards from any port in the United Kingdom upon any voyage for which he is

required so to enter her, or, if that is not practicable, as soon thereafter as may be, mark upon each of her sides amidships, or as near thereto as is practicable, in white or yellow on a dark ground, or in black on a light ground, a circular disc twelve inches in diameter, with a horizontal line eighteen inches in length drawn through its centre.

2 a. The centre of this disc shall (be placed at such level below the deck line marked under the provisions of this Act, as may be so approved by the Board of Trade, and shall) indicate a maximum load line in salt water to which (it shall be lawful) to load the ship;

A report must be made to the Officer of Customs of the distance between the deck line and load line (Sec. 26)."

Merchant Seamen. 1880.

43 and 44 Vict. C. 16.

Abbott on Shipping, 13 Ed. p. 1163.

A seaman shall not be entitled to the rating of A. B. that is to say able-bodied seamen, unless he has served four years before the mast (Sec. 7).

Merchant Shipping (Carriage of Grain) Act 1880.

43 and 44 Vict. C. 43.

Abbott on Shipping, 13 Eng. Ed., p. 1168.

Sec. 3. All reasonable and necessary precautions must be taken in order to prevent the grain cargo from shifting. If such precautions have not been taken, the master and any agent of the owner charged with the loading shall each be liable to a penalty of not over three hundred pounds. The owner shall also be liable unless he shows that he took all reasonable means to enforce the observance of this section.

Sec. 4. Where a British ship is laden in the Mediter-

ranean or Black Sea, and bound out of Gibraltar, or where it is loaded on the coast of North America, there shall not be carried above the main deck any grain except what may be needed to feed the cargo in the hold, and carried in properly-constructed feeders. (2) In the majority of cases (exceptions specified) one quarter of the grain in the hold must be put in bags supported on suitable platforms laid upon the grain in bulk (Sec. 4). The master must deliver at the consular office, the vessel's draught, the kind of grain, method of stowage and precautions taken against shifting (Sec. 6). The Board of Trade may appoint an inspector who shall have the same power as an inspector under the Merchant Shipping Act of 1854, so as to be able to enforce the Act (Sec. 8).

Merchant Shipping (Life Saving Appliances) Act 1888.

51 & 52 Vict. C., 24.

Abbott on Shipping, 13 Eng. Ed., p. 1204.

The owner and master must provide the best of boats, life jackets and other appliances for saving life (Sect. 1).

The Board of Trade is to make rules in detail, arranging ships into classes and providing what appliances each class must have.

If these rules are not observed the Master, if in fault, shall be fined not over fifty pounds. If the owner is in fault he is to be fined not over one hundred pounds (Sec. 4). To enforce these rules a surveyor appointed by the Board of Trade may inspect the ship to see that it is properly provided with appliances. If defective appliances are found notice must be given to the master or owner and to the collector of customs. The latter shall not allow the vessel to clear without a certificate from the surveyor of the Board of Trade that the vessel has proper appliances.

Merchant Shipping Act 1890.

53 Vict. C., 9.

Abbott on Shipping, 13 Eng. Ed., p. 1226.

The centre of the load line disc shall indicate the maximum load line in salt water, to which it shall be lawful to load the ship (Sect. 1).

The Board of Trade may regulate details in regard to this matter. The Board of Trade shall appoint the committee of Lloyds Register to approve and certify the position of the load line disc. (Sect. 2).

The foregoing acts are codified in the Merchant Shipping Act 1894. L. R. Statutes, Vol. 31 (57 and 58 Vict.), 339; Chitty's English Statutes 1894, Tit. Shipping.

Appendix showing the diminution in the loss of life and property at sea in steam vessels, during the last six years.

In the twelve years ending 1895-96, the number of sailing vessels registered and employed in the United Kingdom steadily decreased from 9,849 in 1883-84, to 6,373 in 1895-96. During the same period the number of steam vessels steadily increased from 4,707 to 5,627. The total number decreased from 14,566 to 12,000. The size and tonnage of steamers have also increased.

This change from sail to steam enables a smaller number of vessels by making a larger number of trips, to do an increased business. As each vessel makes more voyages during the year, there is a much greater likelihood of injury and loss of life. In spite of this fact, the returns made to the British Board of Trade show that the death rate has decreased. These official returns cover twelve years, ending 1885-96. Exceptional losses by collision occasionally increase the rate in a given year. For example, in 1894-95, the Kow Shing with 1,150 Chinese soldiers on board sunk

as the result of a collision in the China seas. It is therefore just to take the average of several years. The following is a comparison of the results of these returns for the first six years, with those of the last six.

Per cent of lives lost (including Lascars and those not employed during the whole year) by wrecks or casualties compared with the number employed.

	(1) On Sailing Vessels.	(2) Steam.	(3) Total.
First six years...	.78 2/3%	.39 1/3%	.54 1/3%
Last six years...	1.06 5/6%	.28 1/3%	.50 2/3%

Per cent of lives lost by Wrecks, Casualties and Accidents.

	(1) Sailing.	(2) Steam.	(3) Total.
First six years....	1.32 2/3%	.68%	.92 1/2%
Last six years.....	1.62 1/2%	.55 1/3%	.85 1/2%

Per cent of lives lost by wreck or casualty excluding Lascars and those who were not employed during the whole of the year.

	(1) Sailing.	(2) Steam.	(3) Total.
First six years....	.80 1/3%	.40%	.56 1/3%
Last six years.....	1.12 1/3%	.29 1/2%	.54 1/2%

Per cent of deaths by all accidents compared with number employed, but excluding Lascars and those who were not employed during the whole of the year.

	Total.
First six years.....	79 1/2%
Last six years	74 1/3%

Percentage of tonnage attended with loss of life to total tonnage employed (excluding Lascars and those not employed during the whole of the year).

	(1) Sailing Vessels.	(2) Steam.	(3) Total.
First six years..	2.33 1/3%	1.51 1/6%	1.84 1/3%
Last six years...	2.78 1/3%	1.32 5/6%	1.79 5/6%

From these tables we perceive (1) that the percentage of

loss on sailing vessels is much greater than that on steamers. (2) That though the loss on sailing vessels has increased in the last six years, the loss on steamers has been so much diminished that there is a material diminution of the percentage of total loss.

B. Vessels Lost.

Percentage lost to employed.

	Total Loss Sailing.	Loss of Steam.	Total Loss.
1st six years,	3.21 1/3%	2.64 1/3%	3.01 1/2%
Last " "	3.29%	2.10 1/3%	2.77 1/3%

These figures are taken from the official abstracts of the Returns to the Board of Trade, printed by direction of Parliament, in 1896.

The following extract from a recent report (June 4, 1896) of the Committee appointed by the Board of Trade to inquire into the manning of British merchant ships, contains a summary for a different period (page 45) :

41. "The great reduction in the loss of life at sea, especially in steamers, which is happily observable in recent years, shows that the necessity for further restrictive legislation has dissapeared. In the quinquennial period ending 1880, the annual average loss of lives of crews of steamers by wreck or casualty numbered 466 on a gross tonnage of under two millions, whilst for the five years ending 1894 it has averaged barely over 400 on a tonnage exceeding ten millions."

This Committee differed as to whether or not additional legislation was expedient, in reference to the manning of British ships. The minority dissented on the ground that existing legislation was sufficient and also on the ground that the nations of continental Europe were less exacting in their requirements than the British Parliament had been. But the correctness of the above statement in the minority report was not contested by any one.

In an account of the annual meeting of the English Chamber of Shipping, held at London in February, 1897, the following paragraph occurs:

"The question of loss of life at sea is one which must always be to the fore in the mind of every one who takes the least interest in shipping. It is good, therefore, to know that spite of the crowded state of traffic along our coast, there has been a steady decrease during the last ten years in the percentage of loss of life at sea. Shipowners would like to see this still lower, and the president voiced the feeling of the whole meeting when he asserted that any well-considered scheme to reduce loss of life still further would have their warm support and approval."
—Commerce. London, Feb. 24, 1897.

THE PRINCESS.

(Referred to at p. of Brief.)

Reichs-Gericht; Civil-Sachen (Imperial Court. Civil Cases), Vol. 25, page 104 *et seq.*

Is it a part of the seaworthiness of a vessel provided by the shipowner and carrier that she shall be provided with the requisite (garnier) dunnage.

H. G. B. (Handels Gesetz-Buch) 481, 560.

The exemption of the carrier under the bill of lading, in respect of the fault (verschuld) of the master and mariners in distinction from the fault of the carrier himself or any of his general agents, except the master.

I.—Civil Senate—Decision of May 25, 1889, in the matter of I. H. B. *et al*, defendants, against Captain R. as commander of the steamer Princess, plaintiff.

I.—Local Court (Land Gericht) at Bremen.

II.—Court of Appeal at Hamburg.

The plaintiff, who brought on the steamer *Princess*, commanded by him, a cargo of cotton from Galveston to Bremen, demands, in his capacity as master, in a suit against the consignees of different portions of the cargo, payment of the freight payable on each lot. The amount of freight is not disputed. But the defendants replied setting up counterclaims against the plaintiff, which have not been sustained by the Courts of first and second instance.

The appeal of the defendants is dismissed.

For the reasons:

"The judgment appealed from has for its subject counterclaims which the defendants supported by the contention that they had suffered substantial damage from the fact that a large number of bales, forming part of the cotton consigned to them, had been injured by dirt in the bottom (boden) of the ship and by sea water, in consequence of the want of dunnage.

The defendants demand of plaintiff compensation for the diminution in value of these bales caused by absence of dunnage and by neglect to clean the ship's bottom (boden), and also for the expense caused them by the inspection; alleging that it was the duty of the shipowner to provide sufficient dunnage.

The plaintiff denies this claim, He maintained that he was ignorant of the alleged injury, and declared that he had provided permanent dunnage (festes garnier), which, however, might not have sufficed to protect the cotton from dirt; that the vessel could not be made liable for the damage, as the equipment of the vessel was good and sufficient, and finally that the real question in the case was that of the default of the ship's company, for which by the bills of lading the ship was not liable.

Such bills unquestionably all contained the clause "Negligence or default of pilot, master, mariners, engineers or other persons in the service of the ship, whether

in navigating the ship or otherwise * * * excepted." The Court of first appeal found that movable dunnage had not been provided to protect the cargo sufficiently from the bilge water and dirt of the ships bottom, and that (as the defendants themselves were evidently convinced in the Court of first instance), the cause of damage was clearly to be found therein. According to this finding of fact, to which no exception was taken, and which is therefore binding on the Appellate Court, the Court of first appeal adopted the reasons for which the Court of first instance had held under the bill of lading before the Court that the plaintiff was not liable to the consignees of the cotton mentioned in the bill of lading, for any damage of this kind, which was caused by the fault or negligence of the captain.

In this no rule of law is violated. The Land-Gericht in its reasoning justly began with this premiss, that the suit is brought, not by Captain R. personally but in his capacity as representative of the owner and carrier, and that the counterclaim in question is made against such owner and carrier. Then the Land-Gericht refutes the contention of defendants that it was the duty of the owner to provide proper dunnage by the sufficient argument that although by Article 50 of the H. G. B. the carrier must furnish the vessel in seaworthy condition, yet that the lack of dunnage or defective dunnage does not impair the seaworthiness of the vessel. The duty imposed by said article upon the carrier is indeed altogether general. For although by a vote taken upon the first reading (see Protocol, p. 2066), the words "and its equipment" (geredschaft) following the word "ship" in Article 470 of the Prussian bill (Entwurf) were stricken out, this was done solely for the purpose of giving the article a more general scope and of preventing the inference that it did not extend to,

the sufficiency of other appurtenances of the ship. It therefore certainly belongs to the seaworthiness of the vessel that all instruments and appurtenances which the ship needs in order to be able to enter upon and complete a given voyage shall be provided and in proper condition. The dunnage, however, is not intended to protect the vessel or to enable it to resist winds and waves in stormy weather; but it consists in appliances by which the cargo is to be protected from the sea water, which, as experience shows, enters the ship's hold under ordinary circumstances, and also against contact with the dirt that may be on the bottom, so that there may be seaworthiness of the vessel, though the proper dunnage be absent.

The stowage of goods is a different matter. For by this there is to be prevented; not only injurious effects of the various articles upon one another, and the shifting of the freight by the motion of the vessel and the injury thereby threatened to the goods, but there is also to be secured that proper trim of the vessel requisite for safe navigation; and the prevention of lateral shifting of the cargo which would threaten danger to the vessel. From all which it results that by insufficient or improper stowage the seaworthiness of the vessel may under some circumstances be impaired.

While then the Land Gericht correctly finds that by Article 481 of the H. G. B., it was the captain who should have taken care to have the vessel provided with the proper dunnage, it does not fail to recognize that the owner and carrier, although he is not chargeable with any fault of his own, nevertheless would be liable for the damage in question if he were not by the bill of lading exempted from such liability. Finally if this last-mentioned exemption is approved, in this also no violation of any rule of law can be found, because the damage is to be traced to an error of the capain, for which error by the

clause of the bill of lading above quoted, the vessel is not liable.

The Court of First Appeal adds very properly that though the exemption from all consequences of "negligence or default of pilot, master, mariners, &c." be exceptionally far reaching, yet no objection can be made to it because of the principles of German law as to freedom of contract. This has been affirmed recently in a decision of the Civil Senate of the Imperial Court (Reichs Gericht) Feb. 6, 1889, in the matter of the German National Bank *et al.*, against Captain W.

To conclude, there can be no doubt as both the lower Courts held, that in the determination of the duty of a captain under the bills of lading to be performed in a German port, the German law must govern.

If finally the appeal is sought to be maintained on the ground that in the above-mentioned decision the Imperial Court did not allow the exemption of the owner from the claims of the consignees, upon a clause in the bill of lading precisely similar, this also appears to be irrelevant. For in that case the decision rests upon the principle of law that the owner cannot claim protection under such a clause of exemption, so far as he himself or some general agent other than the captain is at fault; and also on the finding that this was the fact in that case, because the injury to the cotton had arisen by an improper method of stowage usual in Galveston, which was known to the owner's agent in Galveston (by whom the bills of lading were signed) and ignorance of which on the part of the owner would involve culpable negligence. There is no ground whatever for finding any such personal fault of the plaintiff--owner in the present case."

INDEX.

PAGE

STATEMENT 1

ARGUMENT 14

POINTS :

I. THE PROXIMATE CAUSE OF THE DAMAGE WAS THE NEGLIGENT FILLING OF THE TANK AT SEA. THIS WAS AN "ACT, NEGLECT OR DEFAULT OF THE MASTER OR CREW, IN THE MANAGEMENT OR NAVIGATION OF THE SHIP," WITHIN THE EXCEPTION CONTAINED IN THE BILL OF LADING 16

(1.) On the evidence, no other adequate cause appears 16

(2.) Expert evidence tends to show the rivet broke from excessive and unnecessary strain from inside the tank 19

(3.) The uncontradicted evidence shows it was very improper and unsafe to fill the tank at sea, with the ship rolling 21

(4.) The tank was negligently filled, so as to bring unnecessary strains on the bulkhead 23

(5.) The facts indicate that a sufficiently good rivet broke from a wrong use of the tank, and that, accordingly, the loss was within the exception which is valid under English law 28

II. IF NEGLIGENCE IN FILLING THE TANK WAS NOT THE PROXIMATE CAUSE OF THE DAMAGE, THE LOSS WOULD BE WITHIN THE EXEMPTION OF "ACCIDENTS TO * * * HULL, TACKLE, BOILERS AND MACHINERY, OR THEIR APPURTENANCES" 29

III. IF IT BE CONSIDERED THAT THE PROXIMATE CAUSE OF THE DAMAGE WAS A DEFECTIVE CONDITION OF THE RIVET, SUCH CONDITION CONSTITUTED A LATENT DEFECT, WITHIN THE EXCEPTION OF "LATENT DEFECTS IN HULL, MACHINERY OR THEIR APPURTENANCES," CONTAINED IN THE BILLS OF LADING 32

(1.) A defective quality of the iron was proved in libelant's evidence 32

PAGE

(2.) The slight irregularity of the holes was immaterial..... 33

(3.) But if the brittle quality of the iron, or the unfairness of the holes amounted to a substantial defect, both were latent..... 34

(*a.*) Proved by libelant's witness Keyes... 34

(*b.*) Irregularity of the holes, if a defect, was none the less latent, because the man who drove the rivet may have known of it..... 35

(*c.*) All defects are latent, which ordinary inspection at a given time will not discover..... 36

(*d.*) Admiralty cases touching latent defects..... 37

(*e.*) Only ordinary tests are required in examination and inspection..... 42

(*f.*) No proof that ordinary diligence in inspection called for a water test..... 43

(*g.*) The Court should not announce a rule that such a test was required, without evidence that some usage or custom had been disregarded..... 43

(*h.*) Engineer's evidence as to inspection, prior to sailing..... 44

(*i.*) In the absence of evidence that other tests were usual, it will be presumed that the inspection made was the usual kind, and was sufficient..... 46

(*j.*) Uncertainty that the water test would have disclosed anything, is so great, as to make it impossible to show with any positiveness that the failure to adopt it amounted to negligence..... 48

IV. THE EVIDENCE DISCLOSES NO SUFFICIENT REASON FOR DEPRIVING THE SHIPOWNER OF THE BENEFIT OF THE EXCEPTION OF LATENT DEFECTS. HE HAD USED DUE DILIGENCE TO MAKE THE SHIP SEAWORTHY FOR THE VOYAGE, AND SHE WAS SEAWORTHY IN FACT WHEN SHE SAILED..... 49

PAGE

(*A.*) The rule as to the burden of proof is the same, though a breach of the implied warranty of seaworthiness be alleged 49

(*B.*) The shipowner exercised care and diligence in the construction of the vessel, a few months before 50

(*C.*) The interior face of the bulkhead was carefully inspected prior to the commencement of the voyage 52

(*D.*) The steamer was, as a matter of fact, reasonably fit for the voyage 52

(1.) No unseaworthiness as to limber boards 53

(2.) Defects in the rivet were not sufficient to justify a finding of unseaworthiness. 55

(*a.*) Error of the Court below in this respect 55

(*b.*) Proper test of seaworthiness.. 55

(*c.*) Ship was reasonably fit for the voyage, without using the tank 57

(*d.*) Alleged irregularity of holes too trifling to amount to a defect 59

(*e.*) Degree in which the strength of the rivet was impaired, is speculative. The tests it withstood, indicate it should be classed as a reasonably fit and sound rivet 60

V. THE EXCEPTION "LATENT DEFECTS IN HULL, MACHINERY, OR THEIR APPURTENANCES," IMPORTS A MODIFICATION OF THE IMPLIED WARRANTY OF SEAWORTHINESS. IT COVERS THE LOSS AND EXEMPTS THE SHIP 60

(1.) The *Caledonia* is not controlling here 61

(2.) The accepted commercial understanding of the exemption is that it modifies the implied warranty of seaworthiness 67

History of the clause 68

PAGE

(3.) Such an exemption, viewed as a modification of the warranty of seaworthiness, is not obnoxious to the second section of the Harter Act... 75

(4.) The appellant is not in privity with the expressed warranty of seaworthiness in a charter-party between the shipowner and a third party 76

VI. THE BEARING OF THE HARTER ACT..... 77

(1.) The owner exercised due diligence to make the ship seaworthy, &c..... 78

(2.) The damage was within the exemption of faults or errors in navigation, or in the management of the vessel..... 79

(*a.*) Negligent filling of the tank was a default in management..... 79

(*b.*) If the failure to apply the water test before sailing, was a fault, it was a fault of the master in management, and not a want of due diligence in the *owner*..... 81

(3.) The Act operates in effect as an exemption from latent defects, by substituting as the measure of the shipowner's duty, with regard to seaworthiness, a warranty of diligence to make the ship seaworthy, instead of an insurance to that effect..... 83

Supreme Court of the United States,

October Term, 1897.

JOSEPHINE W. WUPPERMAN,
Libelant and Appellant,

AGAINST

The Steamship CARIB PRINCE,
JAMES KNOTT,
Claimant and Appellee.

No. 45.

BRIEF FOR THE CARIB PRINCE ON REARGUMENT.

STATEMENT.

The cause was brought into this Court by a writ of *certiorari*, issued October 23, 1895 (p. 215), to review a decree of the Circuit Court of Appeals for the Second Circuit, rendered June 5, 1895 (p. 216), which affirmed a final decree of the District Court for the Eastern District of New York, entered October 11, 1894, dismissing the libel herein with costs (p. 169). The appeal was argued in this Court in April, 1897 (No. 286 of October Term, 1896), and in May, 1897, the Court ordered a reargument before the full bench.

(1) Inasmuch as the grounds of claim against the vessel have been shifted somewhat in the different courts, and as the final arguments here by other counsel are branching out beyond the issues litigated in the Courts

below, it is important to recur to the issues raised by the pleadings to the course of the trial in the District Court, and to the assignments of error from that Court to the Court of Appeals.

The libel herein, filed September 19, 1893, stated the cause of action against the steamer as follows:

"SECOND.—That on or about the 31st of August, 1893, there was shipped upon the steamship Carib Prince, then lying in the Gulf of Paria, and bound for the port of New York, and engaged in business as a common carrier, by Dr. T. G. B. Siegert & Sons, five hundred cases of Angostura Bitters, the property of your libelant, to be carried to the port of New York and there delivered unto your libelant in the like good order as received, for a freight agreed to be paid therefor; and the agents of said steamship signed bills of lading therefor, dated the 31st of August, 1893, whereby they acknowledged the receipt of said five hundred cases in good order and well conditioned, and undertook to deliver the same at the port of New York in like good order.

"THIRD.—That thereafter and on or about the day of September, 1893, the Carib Prince arrived at the port of New York and there delivered to libelant the said five hundred cases, but not in like good order as received, and that your libelant has suffered damages thereby in the estimated amount of fifteen hundred dollars, payment of which has been demanded of said agents of said steamship and refused."

The bill of lading referred to was not annexed to the libel, as it should have been (2 *Conkling's Adm.*, 485; *Card* v. *Hines*, 33 Fed., 189; The *Torgorm*, 46 Fed., at p. 203), nor did the libel charge any unseaworthiness of the vessel, or particular acts of negligence by her officers or crew, nor give any information of the grounds on which the liability of the vessel was claimed to rest.

In this respect it did not comply with Admiralty Rule 23 of this Court, which states:

"All libels in instance causes, civil or maritime, shall state the nature of the cause, &c. * * * The libel shall also propound and articulate in distinct articles *the various allegations of fact upon which the libelant relies in support of his suit*, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article."

On March 13, 1894, James Knott, claimant and owner of the vessel, filed his answer, denying any knowledge as to the matters alleged in the paragraphs of the libel above quoted (p. 4).

The reason for this want of knowledge was that at the time of the occurrence the ship was hired out under a charter of demise to the Trinidad Steamship Line, which placed its own officers in exclusive charge of the vessel and her navigation (pp. 86, 148).

Besides joining issue on the affirmative allegations of the libel, the answer pleaded the following separate defenses:

"SIXTH. - For a further defense, the claimant avers that the bills of lading under which the merchandise in question is alleged to have been carried, provided that the merchandise in question was 'to be delivered from the ship's deck,' 'where the ship's responsibility shall cease, in the like good manner and well conditioned, at the aforesaid port of New York; the act of God * * * loss or damage from heat or fire on board, in hulk or craft, or on shore, explosion, steam, *accidents to or latent defects in hull, tackle, boilers and machinery, or their appurtenances*, jettison, barratry, *any act, neglect or default whatsoever, of pilots, masters or crew, in the management or navigation of the ship* * * * and all and every other dangers and accidents of the seas, rivers or steam navigation, of whatever nature or kind, always excepted * * * weight, measure, quality, contents and value unknown, and not accountable for inaccurate description of goods shipped, for leakage, breakage or insufficiency in packing, or in strength of package, obliteration of or inaccuracies of marks, numbers, designation or address on the packages, nor for damages or loss from vermin, sweating, decay, heat of holds, contact with or smell or evaporation from other goods; *nor for any consequences arising from any of the foregoing exceptions.*' That the owner and charterer of said vessel used all due diligence to have her properly equipped, manned, provisioned and outfitted, and in every way seaworthy and capable of performing her intended voyage, and used all due diligence in and about the transportation of the merchandise in question, and allege that if the cargo mentioned in the libel was damaged as alleged, the damage was due to latent defects in certain rivets, angle irons, braces and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or

fault in the management or navigation of the vessel in filing the said peak tank on the voyage, as will more fully appear on the trial of this cause. The claimant further alleges that each and all of the above mentioned exemptions in the bill of lading are valid by the law of England which prevails at the port where said merchandise is claimed to have been shipped, and where the said bills of lading are alleged to have been issued."

(**2**.) The bill of lading under which the goods were carried was subsequently put in evidence by the claimant (pp. 145-7). It made the goods deliverable "unto J. W. Wuppermann, Esq.," and contained the following list of exceptions (p. 146):

"The Act of God, the Queen's enemies, Pirates, Robbers, Restraints of Princes, Rulers and People, Loss or Damage from Heat or Fire on board, in hulk or craft or on shore, Explosion, Steam, *Accidents to or latent defects in Hull*, Tackle, Boilers and Machinery, *or their appurtenances*, Jettison, Barratry, *any act, neglect or default whatsoever, of Pilots, Master or crew in the management or navigation of the Ship*, Quarantine, Collision, Stranding, and all and every other *Dangers and Accidents of the Seas, Rivers or Steam Navigation, of whatever nature or kind always excepted.* In the event of the Steamer putting back, or into Port, or otherwise being prevented, from any cause, from proceeding in the ordinary course of her voyage, the Master or Agent to have liberty to tranship the Goods by any other Steamer or Steamers. Average (if any) according to York Antwerp rules.

"Weight, Measure, Quality, Contents and Value unknown, and not accountable for inaccurate description of Goods shipped, for Leakage, Breakage, or insufficiency in packing, or in strength of package, obliterations, or inaccuracies of Marks, Numbers, designation, or Address on the packages, nor for damage or loss from vermin, sweating, decay, heat of holds, contact with, or smell or evaporation from other goods; *nor for any consequences arising from any of the foregoing exceptions.*"

The bill of lading was signed by the charterer (p. 147), but it made no reference to any charter-party.

Three other libels were filed at about the same time for similar damage (pp. 174, 190, 200). All four were heard together in the District Court and in the Court of Appeals (pp. 6, 211), where the other three are still pending. The

aggregate damages claimed in all the libels amount to $5,179.79.

(3.) Owing to the fact that, under the charter-party which the vessel was performing at the time of these occurrences, the officers and crew of the vessel were the servants of the charterer, and not of the shipowner (p. 86), neither party to this litigation had any better opportunities than the other for knowing or investigating the facts in connection with the damage or its cause. The declarations of the master are not under the circumstances admissions binding upon the owner; as admissions, they would be binding only upon the Trinidad Line, which is not a party to the cause. The records contained in the ship's and engineer's logbooks are not binding upon either party as declarations by servants, nor is it to be assumed that the witnesses were biased in favor of either party.

(4.) The libelant took the first proofs in the cause by calling Captain Legge (p. 7) and Chief Engineer Keeys (p. 35) as her own witnesses. The claimant afterwards examined the chief officer, Mr. Scott (p. 94), and the carpenter, Hopkins (p. 107), as his witnesses.

(5.) The following facts appeared:

The Carib Prince was a steel steamer of 1,304 tons net register, 300 feet long, fitted for the carriage of passengers and freight (pp. 7, 8, 9, 14). She was a new vessel, having been in commission only about three months before the accident (p. 7). She had four cargo compartments, numbered from forward aft, and carried her engines between the No. 2 and No. 3 compartments. The holds were separated from each other and from the engine-room by water tight iron bulkheads (pp. 7, 8).

The libelant's cargo was stowed in the No. 1 hold properly dunnaged (pp. 107, 110), and was injured by sea water, that escaped from the forepeak tank by the giving way of a three-quarter-inch rivet in the collision bulkhead which separated the peak from the No. 1 hold (pp. 10, 11, 13, 38, 39). The damage occurred a few days after sailing on the voyage (pp. 11, 147).

The forepeak was a triangular space, about thirty-eight feet wide in its upper part along the collision bulkhead, narrowing down to the keel, and also narrowing forward to the stem head (pp. 40, 35, 7, 9). It was about twelve or fifteen feet in length from the stem to the collision bulkhead (pp. 17, 36). Its depth from the between-deck to the bottom was about twenty-one feet (pp. 16, 35).

It was designed for use as a spare ballast tank, and had capacity for about 83 tons of water (pp. 8, 36). It was securely braced by 'thwartship and fore and aft beams, by stiffening bars, and by knee ties at the sides, all of which were inside the tank and by the square chain locker in the centre on the hold side (pp. 141, 41, 25). The face of the bulkhead in the No. 1 hold was smooth, except that it was lap-jointed (p. 9).

The ordinary ballast tanks were in the bottom of the ship, extending from the collision bulkhead to the stern but divided by partitions at the different bulkheads (p. 8). These tanks were about four feet deep, and extended the width of the ship to the bilges on each side, which were from 18 inches to 2 feet across the top, about 18 inches deep and were V-shaped, being formed by the perpendicular sides of the tank and the curved side of the ship (p. 8). The bilges formed a continuous canal from the bow and from the stern of the ship to the engine-room, being connected at the bulkheads by sluice-cocks or valves (pp. 14, 136, 108, 96). The bilges in each hold also had separate pipe connections leading to the engine-room, thus affording two ways of freeing the different compartments of water (pp. 110, 96). For the purposes of safety, the valves of the pipe-line and the sluice-doors in the bulkheads were usually kept shut at sea (*Scott*, p. 96; *Hopkins*, p. 108, 110). They were opened only to relieve the bilges of water, when found there, by means of the sounding pipes, which lead from the deck to the bilges, and were sounded night and morning (pp. 97, 107).

A wooden floor was laid on top of the ballast tank in No. 1 hold, extending over the bilges to the ship's sides. The floor was caulked up to the edge of the bilges; but that part which extended over them was portable,

was not caulked nor made water-tight, and was designed to be lifted in order to clean the bilges (pp. 15, 100). The portable parts of the floor are referred to in the testimony as "limber boards."

On leaving Grenada, the last port of call, the steamer was trimmed two feet by the stern, her draft being 14 feet 10 inches forward and 16 feet 10 inches aft (*Scott*, p. 95). On September 3rd, a day or two later, the peak tank was filled with water, in the expectation that it would enable her to make better speed (pp. 14, 27, 102). The filling of the tank was begun in the watch from four to eight P. M., and occupied about six hours (pp. 102, 27). During this time the ship was "rolling" (p. 162). On the *next morning* (pp. 11, 16, 108, 109) the sounding of the tank disclosed that the water in it had fallen about four feet (pp. 11, 94, 109); and on sounding the No. 1 hold, an accumulation of water was found there (p. 95). The hatches of the No. 1 hold were immediately removed, and the chief officer and carpenter went below, where they were soon joined by the captain and chief engineer (pp. 11, 16). The lower hold was only partly filled with cargo—to the depth of about five feet (pp. 17, 37, 95).

The chief officer at once found water coming through a rivet hole on the port side of the bulkhead, about two feet from the ship's side, and about six or seven feet above the floor, nearly on a level with the top of the cargo (pp. 95, 88, 40, 41). The rivet was one of a row of six that held a knee tie or stiffening bar (pp. 39, 40). The engineer drove the rivet back, and the hole was stopped with a wooden plug (pp. 39, 95.) The chief officer then picked up from a bag lying immediately beneath the hole, the head, or outer end, of a broken rivet, which had broken off behind the head in the countersunken hole in the plate into which the rivet had originally been headed up when hot (pp. 16, 17, 42).

The water which entered the No. 1 hold through this leak accumulated so that it was up to the carpenter's knees in the after part of the hold; but there was no water in the fore part, except the swash due to the movement of the vessel (pp. *Legge* 17, *Hopkins* 110). It is obvious that the

amount of water that escaped from the small space of the forepeak could not have made much of an accumulation in the large No. 1 hold. Five holes were bored in the limber boards on each side, to permit a freer flow of water to the bilges (pp. 109, 111). The pumps were at once started, and the sluice valves opened, and the hold was promptly cleared of water (p. 110). The remainder of the voyage was made without the use of any water ballast forward, and at about the same speed (p. 27).

(**6.**) The rivet head showed a fair, clear break of the iron, but appeared to be defective and brittle from too much hammering when the rivet was driven in the construction of the bulkhead. The defect was latent and undiscoverable by inspection. The evidence of Mr. Scott, chief officer, with respect to this rivet is as follows (p. 103):

"Q. What was the appearance of the iron on that part of the rivet head which you picked up? A. Clear break, as far as I could see.

"Q. What was the appearance of the iron at the place of fracture? A. I took no particular notice of it. It looked fair."

At page 99:

"Will you be able to state, from such examination as you did make, whether the rivet head was on or off at the time you left Grenada? A. I should say the rivet head was on when we left. It must have been on when we left, because we found it on top of the cargo.

"Q. When did you find it on top of the cargo? A. When we found the tank was leaking, on whatever day it was."

(At p. 105): "Q. Was the rivet head that you picked up lying directly in line below the place where the water was spurting on top of the cargo? A. As far as I remember. I didn't take particular notice to an inch or two.

"Q. Was it fixed in your mind that your rivet head came from that hole? A. Came from that hole, yes.

"Q. You associated them together? A. Yes."

Chief Engineer Keeys testified in regard to the broken rivet (p. 48):

By Mr. Black:

"Q. Are you familiar with qualities of iron, to say *whether this rivet is of good quality or not* (Claimant's Exhibit 6)? A. I am, sir.

Q. *Is it good or not?* A. *No, sir.*
Q. *What is its defect, in your judgment?* A. *Inferior iron, short and brittle, without a fibre.*
Q. Has that been annealed? A. Yes, sir.

By Mr. Kirlin:

Q. Might not this condition of fibre have been produced by too much hammering when it was annealing? A. Yes, sir.

Q. When a line of rivets are put in in construction they usually work on three at a time, do they not? A. Yes, sir.

Q. And every time they put in a new one they tighten the one behind it, do they not? A. They tighten the second one behind it; yes, sir.

Q. As the iron is cooling, if the second one behind is hammered too much that will produce a crystalline character in the iron, will it not, and will give it the appearance of being short and brittle? A. Yes, sir.

Q. That is the appearance that this had? A. Yes, sir."

(At p. 45): "Q. *If there was any defect in that rivet,* which has been marked Claimant's Exhibit 6, before it fell off on to the bag of cocoa, *would it have been discoverable by inspection* from the No. 1 hold, looking at it as it was counter sunk in place? A. *No, sir.*

"Q. Why not? A. Because the head of the rivet is hammered close to the face of the plate."

(**7.**) It was contended in the District Court that the damage happened (*a*) from a latent defect in the rivet, and (*b*), because the limber boards were improperly tight. Judge Benedict found that the damage was caused by a latent defect in the rivet, but that the ship was relieved from liability by the exception of latent defects in the bill of lading; and as there was no evidence before the Court of improper construction of the limber boards, he made no mention of that subject in his decision (*Record*, p. 166; The *Carib Prince*, 63 Fed., 266).

The reasoning upon which Judge Benedict's decision proceeded was as follows (*Record*, pp. 167, 168):

"The evidence in respect to the rivet has led me to the conclusion that the cause of the accident was a defect in the rivet, arising from the fact that the quality of the iron had been injured by too much hammering at the

time it was annealing, so that it became brittle and weak. This defect could not be seen. The broken rivet was found on one of the bags of cargo, and showed that it had broken off in the countersunk part of the rivet, below the head, so that, while the rivet remained in place, no external examination would have discovered the defect.

"This defective rivet was, in my opinion, the cause of the accident. * * *

"If diligence on the part of the shipowner to provide a seaworthy ship, and a justifiable belief on his part that his ship was seaworthy, could avail to relieve him from his warranty of seaworthiness, he could be relieved upon the proofs in this case; but the rule has been declared that if the unseaworthy condition arose from a defective construction, although latent and unknown to the owner, he is not excused. The shipowner must show affirmatively that his ship was seaworthy at the beginning of the voyage.

"The question then arises whether this obligation on the part of a shipowner has been qualified by the clause in the bill of lading which exempts the shipowner from damage caused by a latent defect—which is this case. This was an English ship, the contract was signed in a port governed by English law, and it has been held in this circuit that such a case is to be governed by the law of the place where the contract was made. It was a British vessel, governed by the laws of England.

"Liverpool and Great West. Steamship Co. *vs.* Phenix Ins. Co., 129 U. S., 397; *The Majestic*, 60 Fed. Rep., 624; App., 282–295.

"The law of England, as declared in the case of The Cargo *ex Laertes*, 12 Prob. Div., 187, is to the effect that by the laws of England such an exception as that contained in the bill of lading sued on, if it does not abrogate, at all events limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the shipowner. Applying that law to this case, it follows from the fact that the weak condition of the iron rivet could not be discovered by the exercise of due diligence, that the ship cannot be held liable for the injury to the libelant's cargo, because the danger arose from the latent defect in the rivet which gave way, within the exception of the bill of lading under which the merchandise was carried.

"Upon this ground the libels are dismissed, and with costs."

(8.) The libelant thereupon appealed to the Court of Appeals, and assigned the following errors (Record, p. 171):

"FIRST.—The District Court erred in holding that the steamship Carib Prince was not liable to the libelant for the damage of her cargo alleged in the libel.

SECOND.—The District Court erred in holding that the exception of latent defects in the bill of lading exempted the steamship from liability to the libelant.

THIRD.—The District Court erred in not holding that the steamship Carib Prince was unseaworthy at the time she sailed with the cargo on board, of libelant, and that such unseaworthiness caused the injury to libelant's cargo.

FOURTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect to the *construction* of her ballast tank, which caused the injury to libelant's cargo.

FIFTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect to the construction of her floor over her bilges, which caused the injury to the libelant's cargo.

SIXTH.—That the said District Court erred in dismissing the libel, and should have awarded a decree in favor of libelant for the damages sustained to her cargo."

(9.) Attention is called to the fact that no errors were assigned to the conclusions of Judge Benedict (1) that the shipowner had used due diligence to make the ship seaworthy, and (2) that the primary cause of the damage was a latent defect which "arose from a defective construction."

The "fourth" assignment indeed expressly admits that the defect was "in respect to the *construction* of her ballast tank." It appears, therefore, that the two points upon which the libelants' argument chiefly rests in this Court, namely, that (*a*) the defect in question was not a latent defect, and (*b*) that the owner had not used due diligence in inspecting or testing the tank in order to make the ship seaworthy, were not raised in the Court of Appeals by the assignments of error, the stress of the argument there having been laid, as appears from the opinion (pp. 211, 214), upon the effect to

be given to the exception of "latent defects" in the bill of lading, and to the provisions of the Harter Act.

(**10**.) The Court of Appeals affirmed the decree of the District Court upon substantially similar reasoning to that adopted by Judge Benedict, and further held that the introduction in the bill of lading of an exception of "latent defects," was not prohibited by the second section of the Harter Act (The *Carib Prince*, 35 *U. S. App.*, 370).

The main grounds of the decision in the Court of Appeals was stated by Judge Shipman as follows (Record, p. 212):

"The testimony clearly showed that abundant diligence was used in the construction of the vessel, that the defect in the rivet was a latent one which occurred at the time of the vessel's construction, which was not discovered and was not discoverable at that time, or subsequently, by the exercise of all the known and customary tests and methods of examination, which were all employed; that it was a latent and undiscovered defect in the hull of the vessel at the commencement of the voyage from Trinidad, that, consequently, the vessel was not, at said time, seaworthy, and that the injury occurred solely through this unseaworthiness and not by reason of filling the tank injudiciously.

"The main question in the case is whether the bills of lading expressly or clearly limited the implied and absolute warranty of seaworthiness, which is that the ship was in fact seaworthy at the commencement of the voyage, and is a warranty against latent, unknown and not discoverable defects (The Edwin I. Morrison, 153 U. S., 199; The Caledonia, 156 U. S., ; The Glenfruin, 10 Prob. Div., 103). The recent case of the Caledonia, *supra*, declared that exemptions in bills of lading which limit the extent of this implied warranty, must be expressed in clear terms, or they 'will be construed strongly against the shipowner,' and consequently held that an exemption which excluded loss or damage from defects in steam boilers and machinery, did not mean defects existing at the commencement of the voyage, and thereupon did not protect the owner from liability for unseaworthiness.

"The bills of lading in these cases exclude losses arising from latent defects in the hull, and the question is whether this language does not necessarily mean defects existing at the time of shipment, and therefore whether

it does not clearly and even expressly exclude unseaworthiness arising from such defects.

"The only case in which the effect of an exemption of 'latent defects' is discussed, is the Laertes, 12 Prob. Div., 187, but in that case the language of the bill of lading was 'latent defects * * * even existing at the time of shipment,' so that the intention of the parties to limit the implied warranty was manifest. In the cases at bar, it is urged that the latent defects must necessarily mean those existing at the time of shipment, and that any other construction is exceedingly strained. A defect in order to be latent must have been not discoverable at the time of the shipment. It could not in its nature have been capable of discovery then and have become capable of evading discovery subsequently. A construction which should say that latent defects meant those only which had become latent since the vessel left the wharf, and could not mean previously existing defects, savors of the distinctions of the schoolmen, and if latent defects existing upon the voyage are exempted, those existing at the time of the shipment are included, for they are the same.

"We concur with the experienced District Judge, that the exception 'limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the owner.'

"It is insisted by the libelants that the second section of the act of February 13, 1893 (27 U. S Stat., 445), commonly known as the Harter Act, prohibits any clause in a bill of lading which limits the implied warranty of seaworthiness. The section is as follows.

"'Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document, any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened or avoided.'

"Waiving the question whether this section applies to a foreign contract entered into by owners who are foreigners, the section does not bear the construction placed upon it by the libelants, which is that a comma shall be inserted after the word 'diligence,' and that the clause re-

specting seaworthiness shall be read as a prohibition of any covenant or agreement 'whereby the obligations of the owner of said vessel to make said vessel seaworthy, &c., shall in anywise be lessened.' The language of the section, as passed by the House of Representatives, permits this construction, but in the Senate, the words 'exercise due diligence' were inserted prior to the words 'properly equip,' and the evident intent of the section as amended and the effect of the amendment was to prohibit covenants whereby the obligation of the owners to exercise due diligence *to* properly equip, man, provision and outfit his vessel and to make her seaworthy should be lessened. A like amendment was inserted in the third section, which provided that if the owner exercised due diligence to make the vessel seaworthy, he should not be responsible for damage resulting from subsequent faults in navigation. These amendments indicate the intent which ran through the act as it left the Senate, and make it plain that one design of the act as amended was to permit the owner to relieve himself from the rigidity of the warranty of seaworthiness, but not to permit him to lessen his obligation to exercise due diligence in all respects at the inception of the voyage."

From the decree of the Court of Appeals entered pursuant to the foregoing decision, the libelants sued out this writ.

ARGUMENT.

The first matter for determination is: What was the proximate cause of the damage? The contentions in this brief, with regard to that, will be that it was either (*a*) the improper filling of the tank at sea, while the ship was rolling, or some negligence attending that operation, or (*b*) a latent and undiscoverable defect in the rivet which impaired its strength. If it was either of those causes, the loss would fall within the exceptions of "acts, neglects or defaults in the management or navigation of the vessel," or of "latent defect." If there was no negligence, and the rivet was not substantially defective, the loss would be due to "an accident to * * * hull or its appurtenances" within that exception.

On a finding that the loss was one excepted by the bill of lading the burden of proof would be shifted upon the

libelant, to show some reason why the vessel should not have the protection of those exceptions. This burden the libelant attempts to sustain by seeking to establish unseaworthiness. The claimaint maintains, however, that the ship was not in fact unseaworthy. But if the Court should consider the defective rivet made the ship unseaworthy, it is proposed to maintain that the exception of "latent defects" was designed to and does modify the implied warranty of seaworthiness, and that the ship is entitled to the benefit of the exception of "latent defects", even though she be found to have been unseaworthy, provided the owners used due diligence to make her seaworthy. Such diligence, it is contended, was exercised.

The claimant will also maintain that the second section of the Harter Act does not prohibit the introduction of an exception of "latent defects" in any case, and especially in a case where the contract is made abroad, and valid where made. If the proximate cause of the damage be deemed to be the improper filling of the tank at sea, or any negligence attending that operation, the ship would also be exempted by the third section of the Harter Act.

It will also be contended that the Act operates, in effect, as an exemption from latent defects, by substituting as the measure of the shipowner's duty, with regard to seaworthiness, a warranty of diligence to make the ship seaworthy, instead of an insurance to that effect.

POINTS.

I.

The proximate cause of the damage was the negligent filling of the tank at sea while the ship was rolling without taking adequate precautions to avoid damage. This was "an act, neglect, or default of the master or crew in the management or navigation of the ship" within the exception contained in the bill of lading.

(I.) That the proximate cause of the rivet giving way was the act of filling the tank at sea, while the ship was rolling, would seem to follow from the impossibility of finding, in the evidence, any other adequate cause.

The testimony shows, and both the lower courts have found, that the damage was caused by the breaking of a rivet in the collision bulkhead, about two feet from the ship's side, and five to seven feet from the floor of the hold (pp. 95, 88, 40, 41). Only the head of the rivet broke off (p. 42). This head was found on top of the cargo directly below the hole; it showed a clear, fair break. The circumstances indicated that it had broken off in the filling of the tank.

Chief Engineer Keeys, an expert called by the libelant, who examined the face of the break on the rivet head, testified that the quality of the iron was not good; that it was inferior, short and brittle, without fibre. He said this condition might have been produced by too much hammering when the rivet was annealing; and that it *had* the appearance of a crystalline character, with short and brittle fibre, such as would have been produced by too much hammering as the iron was cooling off when the rivet was originally headed up (p. 48; to the same effect, *Sharpe*, p. 77; *Quinn*, p. 115). It was evidently the opinion of Mr. Keeys that this brittle, fibreless and crystalline character of the iron was the cause of the rivet head breaking off. No other conclusion is fairly to be derived from his evidence.

But the other proof in the case shows that the rivet, brittle as it was from the beginning, had three months before withstood the usual and customary tests applied to determine its soundness and its strength. Three tests had been applied: (1) the knife test (pp. 63, 69); (2) the hammer test (pp. 69, 63, 74); (3) the water test, tried twice (pp. 74, 79, 69). These tests, applied by the builders (p. 63), the shipowner's representative (pp. 69, 79) and the surveyor to Lloyds' Register, under whose supervision the vessel was built (p. 74), showed that this rivet, with all its alleged faults, was of sufficient strength to be classed as a sound and seaworthy rivet.

The water test of the peak tank was tried, not only to determine the tightness of the collision bulkhead, but also its strength. Hydraulic pressure was put upon the bulkhead by the standing-pipe test required by Lloyds' classification rules. In this test the tank is filled with water to the very top, and a stand pipe is put in on top, five or six or seven feet high. When the water comes over the top of that pipe, it is said to have its pressure on, which tests all the workmanship and material and everything in connection with the tank, and proves it fit to hold and carry this depth of water (*Congdon*, p. 52).

Mr. James, the architect of the ship, says (p. 79):

"I was present when the tank and bulkhead were tested by filling the tank with water to about a foot above the main deck. [This would be seven or eight feet above the between-deck, which formed the top of the tank.] I calculated the pressure thus exerted, and found it to be 96¾ tons total pressure on the bulkhead. *That is in excess of Lloyds' requirements.* The bulkhead was thoroughly tight, and stood the test satisfactorily without showing any signs of weakness or leaking."

Mr. Sharpe, the Lloyds' surveyor under whose supervision the ship was built, says (p. 74):

"There were two water tests, and I was present at both. *Those were the usual tests.*"

The foregoing evidence, not in any way disputed, proves that, in the judgment of the most competent experts, this bulkhead, including the rivet in question, was of

more than sufficient strength to withstand the pressure which would ordinarily be exerted in the proper use of the tank. This is the criterion of seaworthiness (The *Titania*, 19 Fed., 101, 107; *Svensden* v. *Stursberg*, 31 Fed., 86; *Rev. St., U. S.*, §§ 4556-4561; cases *post*, p. 56).

The bulkhead in these tests withstood a pressure of $96\frac{3}{4}$ tons. It is obvious that the mere weight of 83 tons of water, lying still in the tank, would exert far less than $96\frac{3}{4}$ tons pressure against the bulkhead. If the entire weight of the 83 tons of water had rested wholly on the bulkhead, it would have presented a pressure less than its tested strength. Therefore, unless the rivet had in some way become weakened between the tests in Sunderland in June, and the pressure under which it broke in September, a very large volume of water must have been thrown against the bulkhead with great force, creating an extraordinary strain in order to break the rivet (The *Exe*, 14 U. S. App., 626).

Is there any *evidence* of any intervening weakening of the rivet? The appellant does not refer to any in either of her briefs. There is not so much as a suggestion anywhere *in the testimony* that the rivet was in any different condition on sailing from Trinidad than when it was when tested in Sunderland.

But it is suggested in argument, without basis in the proof, that the rivet may have been injured in the straining of the vessel during a hurricane a week before the beginning of this voyage. This suggestion should not be received for several reasons.

In the first place, the position of this rivet was not such as to cause a strain to be exerted on it at the place where it broke by the mere working of the ship in heavy weather. It was not in any junction of the bulkhead plates. It went through the center of a plate and through a horizontal knee tie or strap, a right angled piece of iron, one side of which was riveted to the bulkhead, the other to the ship's side. But this was not the only means by which the bulkhead was attached at the side. It could only be made watertight where it joined the ship's side, by means of perpendicular angle irons, riveted not only to the bulkhead plates but to the side plates.

Now any working of the ship in storm would certainly

produce the greatest strain either on the bulkhead at its junction with the ship's sides, or at the places where the bulkhead plates were riveted together. Such strain, at least on the bulkhead plates, would be a shearing, rather than a tensile strain, and would have tended to shear off the rivet, in the middle, rather than to make the head jump off (*Quinn*, p. 115). But the evidence disclosed no breaking of the rivets which joined the bulkhead plates together, or to those which joined the sides of the bulkhead to the sides of the ship (pp. 90, 93). The character of the damage was such as indicated a strain from forward, aft, instead of athwartships.

These circumstances plainly indicate that the rivet was broken by heavy pressure of surging water in the tank, bringing unequal strains upon the bulkhead during the process of filling, rather than that it had been weakened by previous thwartship strains, put upon the bulkhead by the working of the ship in heavy weather.

Moreover the evidence is distinct that the weakness which led to the break of the rivet instead of being due to a strain was a *structural weakness*, a brittleness and crystalline character of the iron, caused by an excess of hammering when the rivet was put in (p. 48).

Finally, it is inconceivable that the plating of the bulkhead could have been so strained as to impair the strength of the rivet, when the more brittle and inelastic Portland cement covering of the bulkhead on the inside was not even cracked in the neighborhood of the rivet, or elsewhere on the bulkhead (pp. 44, 45, 46).

(**2**.) The expert evidence tends to show that the rivet broke from excessive and unnecessary strains from inside the tank.

(**a**.) Libelant called a shipbuilder of long experience, Mr. Quinn, who expressed this opinion (pp. 115, 116):

"If the last rivet, which connects the bulkhead of a tank with the angle iron fastened to the knee-tie, breaks off, what, in your judgment, would be the cause of that breaking, if it was known to you that the holes of that rivet didn't fair? A. I would consider as long as the hole wasn't fair that probably it was crystallized; the rivet

was probably broken after the tank had been made. Again, there is another cause for that. In fairing a hole like that, the rivet came in at an angle, and when the rivet was driven in, it was driven when it was too cold and crystalized, because sometimes when the rivet does not come in very hot they will drive it anyhow, when it is black, especially when they are doing piece work, and that rivet probably broke in the centre, and both sides had stayed in the hole.

By the Court:

Q. If under such circumstances it broke, it broke exactly in the centre? A. In the centre between the two plates.

Q. That is where it would break? A. That is where it would break, and both pieces remain in there.

By Mr. Black:

Q. In this particular case, the rivet head broke at the outside of the tanksheet or bulkhead? A. The clinch came off?

Q. And when that rivet was driven out of that hole, if it was found the *hole did not fair*, and it was the extreme rivet, the innermost rivet of the knee-tie, *what would you say would be the cause of that breaking off?* A. *Extra pressure in the tank.* * * *

Q. *What is the way in which that strain comes to produce the breaking of the rivet?* A. *By an extra strain inside of the tank, if the tank wasn't full of water.*

Though libelant had two other experts on the stand—Captain Legge and Chief Engineer Keeys (witnesses who were not biased in favor of the claimant by any relation of employment, p. 86)—neither of them was asked his opinion as to the cause of the rivet breaking. It is to be inferred from the evidence of Keeys that he thought it broke because of the defective quality of the iron (p. 48); but neither of them stated his opinion on this subject distinctly.

(**b**.) The claimants' experts were of opinion that the rivet had broken from some unusual strain at the time it gave way.

Mr. Sharpe, Lloyds' surveyor at Sunderland, a man of great experience (p. 74), says:

"I can only account for any damage having arisen to the fore peak by the peak having received some *unnecessary* strain or concussion of some sort."

Such was also the opinion apparently of Mr. Congdon Lloyds' surveyor at New York (pp. 133, 135), and of Captain Saunders, superintendent of the Prince Line at New York (pp. 86, 139). See also *Quinn*, p. 123.

(3.) The uncontradicted evidence shows it was very improper and unsafe to fill the tank at sea with the ship in motion.

Thomas Congdon, a shipbuilder by training and Lloyd's surveyor for thirty-eight years (p. 50), testified on this point as follows (p. 133):

"Do you know whether there is any rule amongst navigators as to filling tanks at sea; whether a vessel should be stopped, or whether they can fill them in motion? A. The rule of common sense is the only rule I know about. It is a very unwise thing to fill a tank at sea.

Q. What do you say as to the prudence of filling a tank with the ship going ahead? A. I should say it was a very improper thing to do.

Q. Why? A. Because when the tank is partly full of water and the ship is in motion, it swashes up, and is liable to break on (down) the bulkhead. I have seen a bulkhead knocked flat on the ship's bottom, where the tank has not been full, the ship rolling and water swashing knocked the bulkhead down."

Cross-examined (p. 135):

"Q. Do you know anything about hydraulic pressures? A. Tell me what you want to know?

Q. Do you know how many additional pounds or tons pressure is brought on a bulkhead by the increase of one foot in a standpipe [an allusion to the mode of testing tanks in new ships, fol. 155]? A. Yes, sir.

Q. In a bulkhead of the size of that of the tank of the Carib Prince, how much additional pressure would be brought on that bulkhead? A. I must know the area of the bulkhead.

Q. You saw the bulkhead, didn't you? A. I will tell you that about six or seven or eight inches rather, in this standpipe, would be about a pound pressure on each square inch of the bulkhead, and you can calculate the whole thing.

Q. Would a pressure of that much on that bulkhead be as great as, or greater than, the pressure caused by the

water being in movement, when the tank was not full? A. Nothing to compare it to; you can't compare the two.

Q. *You think there is nothing in the nature of forces that you can compare between pressure and impulse?* A. *The swash is the more severe of the two on the bulkhead, most decidedly.*

Q. If the sea is smooth, and the steam vessel is not rolling, would the tanks suffer any extraordinary strain by being filled at sea? A. If the water is perfectly smooth, of course it could not suffer. If there is motion of the ship, either *rolling* or plunging, *it naturally would.*

Q. If there is no such motion, there is no danger of that? A. Quite so.

Q. *It is due to the surge of the water coming with an impact on the bulkhead?* A. *Exactly.*

Q. Would not such an impulse as that have a tendency to snap off a great many heads of rivets? A. *I have seen a bulkhead knocked right down.*"

Frank S. Martin, a marine engineer and surveyer of fifteen years' experience, also a shipbuilder by training (p. 90), testified (p. 91):

"Q. What do you say as to its being a prudent thing to fill such a tank without stopping ship? A. I say it is not prudent.

Q. Why? A. The immense volume of water there is pressing against the bulkhead with the motion of the ship going through the water."

Captain Saunders, a master mariner, who had been in command of steam vessels with this class of tank (p. 86), now superintendent for the Prince Line, which operates about fifty steamers (p. 84), testified (p. 86):

"Q. Can you say whether or not it is a prudent thing to do, to fill the peak tank at sea without stopping the ship? A. It is not. The proper thing is, a ship should be stopped and perfectly still. It is a very unwise, unsafe thing to do on account of the strain, *the motion of the water causing heavy strain on the bulkhead.*"

This, as Mr. Congdon well said, is "the rule of common sense." It is also the rule of which a skilled master should know and observe. It is enjoined upon mariners by the hand books issued for their guidance. Thus, in *Mitcalfe's*

Suggestions to Mariners (4th Ed., Newcastle-on-Tyne, 1886), it is said:

"No. 20. The captain of a steamer well loaded with grain or other perishable cargo, disc just awash, should not be persuaded while steaming at sea to fill any of the ballast tanks under the cargo to alter the trim and increase the speed; success is doubtful at the best, while even if the tank is tight to commence with, the engineer will probably leave the sea cock open after the tank is full and strain it. Certainly a claim for damage to cargo will result and may, perhaps, be the most fortunate result of a reckless and wilful act of improper navigation."

"No. 30. It is time enough to think of filling the tanks *when required to stiffen the vessel.* * * * Let the captain think twice before doing it, and reflect that he opens a three-inch hole in one bottom without seeing the other one, or knowing where the water goes. Being in charge of many lives and of valuable cargo, he will do well to watch this risky operation from start to finish and himself order the sea cock to be closed, or see it done, or he may find himself personally liable if damage results from neglect of this precaution.

"No. 109. Remember also, that it is *exceedingly dangerous to run up your ballast tanks at sea when the vessel is rolling*, as there may be difficulty *in filling* them, or the tank top may be injured by the water rushing from side to side."

(**l**.) The tank was negligently filled so as to bring unusual and unnessary strains on the bulkhead.

The ship was rolling at the time. The motion thus given to a large body of water would cause heavy strains at the acute angles of the tank formed by the bulkhead and the narrowing sides of the bows.

(**a**.) It is stated that the tank was filled on the evening of September 3d. The work was begun in the mate's watch, which was from 4 until 8 P. M. (p. 102), and occupied about 6 hours (p. 102). Though the duty of seeing that the tank was properly filled, belonged to the mate (*Legge*, p. 11; *Hopkins*, p. 110) he says he was not on deck when it was finished (p. 102). The carpenter, whose duty it was to take soundings during the filling process (p.

110), had gone to bed, leaving word with a seaman to call him when it was full (p. 108). He says he was called, examined it and found it full (p. 108), but it does not appear that he took any soundings at that time in No. 1 hold. Hence it is not known definitely whether the tank was then leaking or not From the quantity of water found in it the following morning (pp. 17, 110) the presumption would be that it was.

(**b.**) Taking the mate's statement that they began filling the tank in his watch from 4 to 8 P. M. September 3d, and that the operation took six hours, it is obvious that it could not be full before 10 P. M. The master says it *was* full at that hour (p. 27).

The only record in either of the logs touching the filling of the tank is in the engineer's, where, opposite the hour of 9 P. M., September 3d, an entry appears: "Pumped up fore peak tank." In the same watch, he has the entry: "*Ship rolling.*"

Although the mate testifies that at the time the tank was filled the *weather* was fine, he says nothing about the sea or the rolling of the ship. His log, however, shows (p. 159) that on that afternoon and evening they had "brisk breeze," "strong breeze," and later, "fresh breeze" from E. by N. to E. N. E., while their course was N. W. by W. and N. W. by N. 1/2 N. This gave them substantially a beam wind, and would naturally produce the effect recorded by the engineer—"ship rolling." As there is no evidence to contradict the engineer's entry, and the force and direction of the wind seem to confirm it, the fact should be accepted that the ship *was* rolling.

Mate Scott says the ship was not stopped while the tank was being filled (p. 102). If she was rolling at the time, the failure to stop made the fault no worse; but according to the uncontradicted evidence of the experts, (*ante*, p. 21), it was a fault to fill the tank at all at sea, unless the ship could be stopped, and when stopped would be still.

The evidence as to the length of time the water was left in the tank is not satisfactory. The carpenter, whose

business it was to watch the process (p. 110), says that it was filled one night and found leaking on the next morning (pp. 108, 109), and there are statements in the master's evidence to the same effect (pp. 11, 16, 108, 119).

Captain Legge testified (p. 11):

"Q. On what day was that filled? A. On Sunday night, the 3d of September. * * *

Q. When did you first find out that it was defective? A. By sounding the tank the *next morning*.

Q. What did you discover by sounding it? A. Discovered that the tank was not full when it had been full the *previous night* after filling it."

(At p. 16). Q. When you went down into the No. 1 hold, what time of day was it? A. The first thing in the morning.

Q. Of the *4th of September?* A. Yes, sir."

The carpenter, Hopkins, testified (p. 108):

"Q. Do you remember on what day this leak was found? A. I think it was a Monday morning.

Q. How long before that had the tank been filled? A. I think it was Sunday night, but I am not sure about that.

Q. The night before you sprung the leak? A. Yes, sir."

(P. 109). When I sounded at night, when I knocked off, the tank was full, and the *next morning* I sounded the tank and I found a deficiency in the tank; then I went to the limbers and I found there was water in it. I then informed the chief officer, and he and me went down and found water in the No. 1 hold."

The engineer, on the contrary, has recorded that the water was in it from the evening of September 3d until the morning of September 5th (pp. 162, 164). But the entry of filling the tank looks as though it had been recorded after the entries for that day had been finished. In all other instances on the three *facsimile* pages of his log (pp. 162, 163, 164), his entries are begun opposite the hours at which the different watches commenced, namely, 1, 4, 8, 12, while opposite the beginning of the watch, 8 P. M., September 3d, two dashes had been drawn, apparently to indicate a blank, and the entry of "Pumping up the peak tank" was put opposite the second hour of that watch. It cannot be that this was the

record of the time when the pumping up of the tank was begun, because that was in the watch which ended at 8 P. M. (p. 102); occupied six hours (p. 102), and was finished at 10 P. M. (p. 27).

It is to be inferred that the engineer had no entry in his log of the filling of the tank until after he found it necessary to enter the leak next day and the fact of pumping the tank *out;* and that either through inadvertence or by design, he went back and entered the time of filling so as to leave a day between the two operations, and thus create an impression that it had not been broken by the negligent mode of filling it.

(**c**.)—There was not the least pretext that the tank was filled under the stress of any real necessity. The master, who was not the servant of the shipowner, attempted to justify his use of the tank by saying it was to correct the trim; but from his evidence, the trim was not unusual (pp. 14, 27), and both he and the mate concede that it was filled in the expectation of bringing the ship's head down only six or eight inches, to make a trifling gain in speed.

Mate Scott (p. 102) said:

"Q. What was the occasion of filling it? A. Because the ship was so much astern, we thought she would go easier - steam better."

Captain Legge (p. 14) testified:

"Q. How did you come to fill up this tank on the third of September? A. On leaving Grenada, the vessel was three (two) feet by the stern, and proceeding to New York, every day using coal—burning coal—puts her more by the stern

"Q. It lightens her up forward? A. I considered it absolutely necessary to fill this ballast tank to keep the vessel in trim.

"Q. Had you a cargo on board? A. Yes, sir.

"Q. What was the draft when you left Grenada? A. 14 feet 10 forward, 16 feet 10 aft.

"Q. Had you had a cargo on the voyage from New York to Trinidad also? A. Yes, sir."

(Page 27.) "Q. What was her draft on the voyage down? A. 15 feet 3 forward, 17 feet 4 aft (two feet one inch by the stern).

"Q. On the voyage from Trinidad or Grenada to New York, on which this occurrence happened, her draft was 14 feet 10 forward and 16 feet 10 aft before you put the water into the tank? A. Yes, sir.

"Q. When you put the water into the tank, what was her draft? A. We were at sea then, and we could not ascertain exactly the draft; that tank ought to tip her six or eight inches.

"Q. When you emptied the tank, you came to New York without anything there? A. Yes, sir.

"Q. You did not shift any cargo? A. No, sir.

"Q. And did not change the trim of the vessel at all? A. I had no other way to do it.

"Q. And you arrived in safety? A. Yes, sir: only she didn't steam as fast; that is the only thing; the runs in the log book will show that.

"Q. Give me the precise hour at which this tank was filled up on the third of September? A. 10 P. M. of the 3d; it was emptied at 6 A. M. of the 5th. The tank was filled for a period of thirty-two hours.

"Q. What was the speed you made while the tank was filled? A. 247 miles the first twenty four hours; the next day's run was 246, an average speed of about $10\frac{1}{4}$.

"Q. What was the speed during the next twenty four hours? A. 241.

"Q. That was when the tank was empty? A. Yes, sir."

(**d**.) If it be considered that in addition to the examination made of the interior of the tank by the engineer after the storm in August (pp. 43-46), it should have been tested by water before sailing from Trinidad, one or two further considerations should be adverted to.

It seems plain that the duty of testing the tank with water at Trinidad, if it rested upon anybody, belonged to the captain; and he was aware when he proposed to fill it up on September 3d that no such test had been made. If, as a reasonably prudent captain, he was bound to test it with water in Trinidad, then, of course, he was bound to refrain from filling it with water on the voyage, except under stress of some extreme necessity, and if he filled it at all, should have stationed a watch in the No. 1 hold to see that the tank did not leak when it was filled.

The length of time that the water remained in the tank has a bearing in considering this aspect of the master's duty.

If it remained there thirty-two hours before the leak was discovered, as the master says (p. 27), and if the soundings were taken with regularity during that time, especially on the morning and evening of September 4th, in accordance with the rule prevailing (p 97), and as the carpenter testifies they were (Hopkins, p. 102), then it is clear that the rivet did not break in the filling of the tank on September 3d. But if it did not break then, obviously it would not have broken and disclosed a defect by merely filling it in Trinidad. There was no breach of duty or want of diligence in failing to fill it there.

If, on the contrary, the water was not in the tank thirty-two hours, but the leak was discovered in the morning after the tank was filled, then it seems reasonably certain that the rivet broke in the process of filling, and that a watch in the hold would at once have detected the leak, and thus avoided the damage. The proximate cause of the damage, therefore, was the wrongful act of the master in filling the tank at sea at the time he did, without having applied the water test in Trinidad, or without having a watch in the hold during the time it was being filled (*Hedley* v. *Pinkney & Sons S. S. Co.* [1892] 1 Q. B., 56, 65; [1894] A. C., 222; *Ins. Co.* v. *Transportation Co.*, 12 Wall., 194; *Orient Ins. Co.* v. *Adams*, 123 U. S., 67; *Transportation Co.* v. *Downer*, 11 Wall., 129; *Railroad Co.* v. *Reeves*, 10 Wall., 176; *Morrison* v. *Davis & Co.*, 20 Pa. State, 171; *Scheffer* v. *Ry. Co.*, 105 U. S., 249; *Northwestern Transportation Co.* v. *Boston Marine Ins. Co.* (the *Ontario*), 41 Fed., 793, 808; *City Fire Ins. Co.* v. *Corlies*, 21 Wendell, 367, 369, 371; *Lewis* v. *Springfield Fire and Mar. Ins. Co.*, 10 Gray, 159; *Kenniston* v. *Merrimack Ins. Co.*, 14 N. H., 431; *Babcock* v. *Montgomery Ins. Co.*, 6 Barb., 637; *Grim* v. *Phœnix Ins. Co.*, 13 Johns. Rep., 451).

Such a watch could have been readily maintained, since the cargo was only about six feet deep in the lower hold, and the circumstances attending an actual discovery of the leak (pp. 17, 40, 41, 88, 95), indicate that it would have been easily detected.

(5.) The conclusion from the foregoing facts is that a sufficiently good rivet broke from a wrong use of the tank, and that accordingly the loss should be regarded as due to "an act, neglect or default of the master or crew, in the management or navigation of the ship," within the exemptive clause contained in the bill of lading.

This bill was issued in Trinidad, a British possession, for the transportation of goods upon a British vessel. The damage occurred on the high sea. In these circumstances, the contractual rights and obligations of the parties under the bill of lading are to be determined according to English law (The *Titania*, 19 Fed., 101; *Liverpool Steam Nav. Co.* v. *Phenix Ins. Co.*, 129 U. S., 397; *Foncesca* v. *Cunard S. S. Co.*, 153 Mass., 553; *O'Regan* v. *Cunard Co.*, 160 Mass., 356). By a stipulation entered into on a trial in the District Court (p. 7), "it is admitted that under the English law *the language of the bill of lading made a valid contract.*" It is no longer against the public policy of this country to uphold exemptions from faults or errors in the management or navigation of a vessel, since, by the third section of the Harter Act, similar exemption is afforded by statute (2 Supp. R. S., p. 81).

II.

If negligence in filling the tank was not the proximate cause of the damage the loss would be within the exemptions of "accidents to * * * hull, tackle, boilers and machinery, or their appurtenances" and "accidents of the seas, rivers or steam navigation of whatever nature or kind."

It was held in the courts below that the Master made a justifiable use of the tank, in filling it as he did, and was not chargeable with negligence in that particular (pp. 167, 214). Both Courts found that the loss was within the exception "of latent defects" (pp. 169, 213). The claimants urged below, and maintain here, that the defects in the rivet were

trifling and immaterial; but in any event, the loss would be deemed to be within the above quoted exception. Even though a latent defect may have contributed to the result, it would still be "an accident to the hull and its appurtenances," and a "danger of the seas and of steam navigation." The *Thrunscoe* [1897], Prob., 301. The materiality of the inherent defect would relate only to the question whether the owner, by the exercise of reasonable care and diligence, could have discovered it, and whether the want of such care should deprive him of the benefit of the exception (The *Miranda*, L. R., 3 A. & E., 561; *Nine thousand Bunches of Bananas*, 8 U. S. App., 405; The *Curlew*, 51 Fed., 246; The *William Lindsay*, L. R., 5 P. C., 338; The *Virgo*, 3 Asp. Mar. Cas., n. s. 285; The *Xantho*, 12 App. Cas., 503).

In the case of *Nine Thousand Bunches of Bananas*, 8 U. S. App., 405, a steamship, under time charter, broke the junk ring of her high pressure cylinder, after encountering some roughness of sea, whilst on a voyage towards the port where she was to take on a cargo of green fruit. The charter-party excepted "all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation." In consequence of this delay, her cargo of fruit, which had been cut in anticipation of her earlier arrival at the port of loading, was over-ripe and damaged on reaching its port of destination. In the course of the opinion delivered by HUGHES, District Judge, the Court of Appeals (pp. 407, 408) said:

"The great preponderance of evidence shows that the breaking of the junk ring in one of the cylinders in the engine of the *Curlew* was an accident that could not be foreseen; that there was no flaw in the ring that could be detected in examining its broken pieces after the accident; and that from its having performed its function without jar or fault for six days of the voyage anterior to the accident, the inference is reasonable that its breaking was from some cause exterior to itself, and not from any defect of its own, and, therefore, this breakage was one of those *accidents of the sea* and *of the machinery of the ship*, from the consequences of which the charter-party exempted the ship."

In the *Miranda*, L. R., 3 A. & E., 561, a steamship laden with a general cargo, became disabled at sea, in consequence of her machinery breaking down. Her cargo had been shipped under bills of lading which contained among the excepted perils "accidents from machinery." Another steamship belonging to the same owners fell in with the disabled vessel and towed her into safety. The question before the Court was whether the owners of the vessel rendering the service were entitled to recover salvage remuneration against the cargo laden on board the disabled vessel. Sir R. Phillimore held (pp. 566, 567):

"If I am to decide the question whether the owners of the Roxana are entitled to salvage reward, I must first determine whether they are so entitled apart from the question of their being the owners of the vessel salved. I think unquestionably they rendered a salvage service entitling them to salvage remuneration, unless peculiar circumstances have rendered it impossible for them to recover that remuneration.

"It becomes necessary, therefore, to decide the question of law. The contract set out in the bills of lading is that the Miranda should take her cargo on board, and deliver it at the port of London in the like good order and condition as shipped; then follow many exceptions which are to be considered as affording a justification for the non-performance of the contract, and among these exceptions is included one about which there has been much discussion. This exception, which is contained alike in all the bills of lading, though not always expressed in precisely the same words, is as follows: 'Accidents from machinery.'

"If I had to determine the case upon the point raised with reference to the alleged implied warranty of seaworthiness, I should rule that the burthen of proving the breach of such warranty rests with the defendants, and that sufficient evidence as to the vessel's state, and the state of her machinery, has not been given to lead the Court to find that she was in an unseaworthy condition at the time the cargo was shipped. But I think the true question in the case is—Does not the exception 'accidents from machinery,' include the present case? I think that I must come to the conclusion that the accident in question finds its place among the excepted perils; it is therefore unnecessary for me to discuss the able argument which has been addressed to the Court with respect to a warranty of seaworthiness being implied in the contract."

III.

If it be considered that the proximate cause of the damage was a defective condition of the rivet, such condition constituted a "*latent defect*" within the exception of "latent defects in hull, machinery, or their appurtenances," contained in the bill of lading.

In considering this point it is important to bear in mind the way in which the question arises.

The shipowner claims the benefit of an exception of "latent defects" contained in his contract. By force of the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee, liable only for negligence (*York Co.* v. *Central Ry.*, 3 Wall., 107, 112). The libelant seeks to defeat the operation of the exception by proving negligence. The question thus presented is, did the failure of the carrier to discover the defects in the rivet constitute negligence on its part? If the exercise of ordinary care would not have discovered it the failure does not amount to negligence. Hence, in considering the appellant's argument on this subject, it is to be borne in mind that the measure of the shipowner's duty was merely ordinary care—not the highest degree of care—much less that of warranty.

The rivet is claimed to have been defective in two particulars, (1) that the iron was brittle, fibreless and crystalline, due to an excess of hammering when it was originally put in (p. 48), and (2) in that the holes through which it passed were not true (pp. 49, 50).

The claimant maintains that both of these defects, if material, were latent in the sense that they were not discoverable by ordinary care.

(1.) A defective quality of the iron was proved by the libelant's witness, the chief engineer, who evidently attributed the damage to that cause (Keeys, p. 48). His evidence is not disputed. It must be assumed, therefore, that the iron was crystalline and in some degree lacked strength. It is not pretended, however, that this *qual-*

ity of the iron could have been detected, prior to the break, by any kind of a test.

(**2**.) The blemish with regard to the holes was testified to by libelants' witnesses Keeys (pp. 49, 50), and Clarke (pp. 118, 119). Keeys merely said the holes did not come true, and that the boilermakers cut them out and made them true when they effected permanent repairs (p. 50). The permanent repairs were not effected until the following January. In the interim, the holes were stopped up by a bolt and nut (pp. 84, 85, 87). Keeys drew no conclusion from this unfairness of the holes.

Clarke's testimony was as follows:

"Q. What was the difference of the untrueness of those two holes in respect of fairing? A. It did not appear to be fair in the hole between the two plates.

Q. How much? A. I did not measure it; I couldn't say.

Q. How much? A. About an eighth of an inch.

Q. (By the Court.) One plate slipped by the other an eighth of an inch? A. Apparently; *it was rounded on the edge of the inner plate.* * * *

By Mr. Kirlin:

Q. Did you put your fingers through that hole? A. Yes, sir.

Q. Was there a sharp edge to the inside of the hole on the angle iron where it came against the plate? A. It was battered, the iron was, on the inside plate. * * *

Q. Can you swear accurately as to how much the holes lacked of being fair? A. I could not; I did not measure it.

Q. Pretty hard work to swear between an eighth and a sixteenth of an inch, wouldn't it be? A. I think it would" (pp. 118, 119).

Captain Saunders also put his fingers through the holes. He testified (p. 88):

"By Mr. Black:

Q. Did you put your finger in the hole? A. I did.

Q. Did you go all the way through? A. Yes.

Q. Did you feel the angle iron at the back? A. Yes.

Q. And was all smooth and fair there? A. Except rusty; it was fair.

Q. The hole of the angle iron and the hole of the bulkhead were exactly in line, were they not? A. As I said

before, it may have been a shade out, but it was practically fair.

Q. Could you run your finger through it easily? A. I could with ease.

Q. Did you measure it? A. I did not. * * *"

"By Mr. Kirlin (p. 85):

Q. How were the holes? A. The holes were true.

Q. The holes in the knee-tie and in the bulkhead? A. Were practically true; they might be a shade out more or less.

Q. What is a shade? A. Say, might be a sixteenth of an inch.

Q. Does that make any difference in the strength of a rivet? A. It does not."

The libelants' expert Quinn, who testified that putting rivets through unfair holds tended to weaken them, so that they would break "*at the centre*" (p. 115), was questioned on this subject:

"By the Court: Q. *Would you reject a piece of work where a three-quarters of an inch rivet had been driven in hot, the hole not fairing from a sixteenth of an inch to a little more, perhaps?* A. *No, sir; it is done every day.*

Q. *And called good work?* A. *Yes, sir*" (p. 125).

It seems obvious from the circumstances that the different experts were able to put their fingers through the three-quarter inch holes (p. 17), that they could not have been very much out of line, or that the experts must have had very small fingers. It is also clear that three-quarter inch rivets could not have been put through three-quarter inch holes unless they were substantially fair (p. 56).

(**3**.) But if the brittle quality of the iron, or the unfairness of the holes, amounted to a substantial defect, nevertheless both were latent, in the sense that they could not have been discovered by inspection prior to the sailing of the vessel on the voyage.

(**a**.) This is proved by the libelants' own witness Keeys, who says:

"Q. *If there was any defect in that rivet*, which has been marked Claimant's Exhibit 6, before it fell off on to

the bag of cocoa, *would it have been discovered by inspection* from the No. 1 hold, looking at it as it was countersunken in place? A. *No, sir.*

Q. *Why not?* A. *Because the head of the rivet is hammered close to the face of the plate*" (p. 45).

It seems almost too plain for argument that the defects in the rivet (if they can be considered to be such, in view of the tests to which it had been subjected, and which it had withstood) were between its head which rested against the knee-tie on the side of the tank, and its point which had been hammered into the countersunken hole on the bulkhead side of the plate, so as to be level, or nearly so, with the surface of the plate (p. 45). The defects, therefore, if any, were out of view and beyond reach of any known test which would have disclosed the interior conditions. At least, there is nothing in the record to suggest that any known test would have disclosed them.

(**b.**) The defect was none the less "latent" in the sense of the exception, because the men who originally drove the rivet, may have known the holes were defective.

Appellant's argument assumes that although an existing defect in the vessel may be a latent defect, *as between the parties to the contract*, yet the law would not regard it as latent, if a third person, at some anterior time, may have known of it. But this bill of lading was made some time after the ship was built, and was in effect between the shipowner and Madam Wupperman. It evidently contemplated a state of facts which might then exist. By this provision the master in effect said to her shipper: "There may be latent defects in the hull of my ship that I do not know of, and which I cannot ascertain by inspection. For damages arising from such latent defects, which are not due to my fault, and which I cannot avoid, the ship will not be responsible." By accepting this bill of lading, the shipper in effect said: "For defects that are *now* latent in the hull, I agree the ship shall not be liable." To say that such a defect, which the shipowner did not know of, and could not discover after he had bought the ship, and at the time this contract was made, was not in fact a latent defect,

in the sense of the exception, merely because the machinist who drove the rivet may have known some months before that it was defective, is to disregard the obvious intention of the parties in introducing the exception, and to substitute for it a fictitious presumption of their intention.

(c.) The appellant also argues that in determining what a latent defect is, resort must be had to the law of latent defects, and that by such law nothing is a latent defect which human ingenity could possibly detect.

To this, it may be replied that, strictly speaking, there is no law of latent defects. Questions of responsibility for them arise more commonly with regard to the carriage of passengers, or in connection with injuries to servants or others, through defective appliances furnished for use in mercantile operations. But in all such cases the liability, if found, finally depends on the law of negligence, determined with reference to the degree of care required in the particular case. If the defendant was not wanting in such care, the plaintiff cannot recover merely because some servant of a reputable maker, from whom the defendant buys his appliances, may have been negligent (The *Benbrack*, 33 Fed., 687, 688; The *Dago*, 31 Fed., 574).

In the appellant's original brief (p. 13), detached expressions are cited from opinions in a number of cases with regard to the liability of carriers of passengers for defective car wheels, axles, &c.; but on examination, it will be found that these cases are not really authority for the proposition that the defects in this rivet were not latent.

The early English, Massachusetts and New York cases cited by the appellant, although not expressly repudiated by later decisions, have nevertheless been limited and distinguished (12 *Am. & Eng. Encyc. of Law*, 916). The sentences from the opinions which are quoted by the appellant are largely *obiter*. Most of the cases were decided when the doctrine of graded diligence prevailed. In the later cases, it has been held that, if the carrier purchases from reputable manufacturers, and gives the vehicles *such inspection as is usual* and practicable, he is not responsible for defects not so discoverable (*Readhead* v.

Midland Ry., 4 Q. B., 380; *Grand Rapids Railway* v. *Huntley*, 38 Mich., 537; *Nashville Railway* v. *Jones*, 7 Heiskell, 27; *Illinois Central* v. *Phillips*, 49 Ill., 234; *Allen* v. *Dry Dock Railway*, 19 St. Rep. (N. Y.), 114; *Carlson* v. *Bridge Co.*, 132 N. Y., p. 273; *Caril* v. *S. I. Railway*, 58 N. Y., 138; *Ladd* v. *New Bedford Ry.*, 119 Mass., 412). It is not the duty even of a carrier of passengers to adopt all such speculative and theoretical precautions as might be thought necessary by experts. The precautions necessary are those recognized by men of practical experience, and such as are usually adopted (*Robinson* v. *N. Y. Centl. Ry.* 20 Blatchf., 338, 340; *Texas Pacific Ry.* v. *Barrett*, 161 U. S., 617, 618).

These cases recognize the doctrine that negligence, not warranty, lies at the foundation of liability in actions of this kind, and hence that such carrier's obligation is measured by the exercise of that degree of care which is reasonably called for in the special circumstances—not by the very highest degree of care, as was intimated in some of the earlier cases.

Moreover, the analogy drawn from cases of carriers of passengers is very imperfect. Such carriers are held to a *high* degree of diligence, because of the risks to life that follow even slight relaxations of care. The question did not arise in any of the passenger cases cited, as to the effect of an express exception from "latent defects." The point in the present case is merely whether the defect in the rivet was such as to baffle *ordinary* care in inspection—the condition to be proved in order to bring the loss within the exception.

(**d.**) The question as to what constitutes a latent defect has been passed upon in a number of admiralty cases, where it has uniformly been held the shipowners measure of diligence to discover defects is the exercise of *ordinary* care. (The *William Lindsay*, L. R., 5 P. C., 338; The *Nederland*, 7 Fed., 926, Butler, *J.*; The *Dago*, 31 Fed., 574, Pardee, *J.*; The *Flowergate*, 31 Fed., 762, Benedict, *J.*; The *Benbrack*, 33 Fed., 687, Hughes *J.*; The *Concord*, 58 Fed., 913, Brown, *J.*; The *France*, 59 Fed., 479 (C. C. A.); *Riley* vs. *State Line S. S. Co.*, 29 La. Ann., 791; The *Titania*, 19 Fed., 101, Brown, *J.*; The *Lizzie*

Frank, 31 Fed., 477, Toulmin, *J.*; The *Olympia*, 22 U. S. App., 69, 79, 80; *Marsden on Collisions*, 3d Ed., 11, 24.)

In the *William Lindsay*, 5 Privy Council, 338, a vessel in port was moored to a buoy, the use of which was sanctioned by the port authorities for this purpose. The mooring buoy broke from some defects in it (p. 344), and the vessel was prevented by inevitable accident from dropping her anchor in time to avoid collision with another vessel which was properly moored. The question before the Court was whether the first vessel had contributed by negligence to the collision.

In the course of the judgment delivered by Sir Montague E. Smith, the Privy Council said (p. 343):

"These being the facts, the question arises whether there was any negligence in what was done or omitted to be done on board this vessel. Now, the master is bound to take all reasonable precautions to prevent his ship doing damage to others. It would be going too far to hold his owners to be responsible, because he may have omitted some possible precaution which the event suggests he might have resorted to. The true rule is that he must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed. In this case the immediate cause of the mischief was the breaking of the band on the buoy, and it is said that the William Lindsay must be responsible for that breaking, because the master had chosen to moor her to it, and to treat it, without examination, as if it was his own mooring chain.

"Their lordships consider that that is not the correct view of the question. [The judgment then discussed the question whether the master was justified in availing himself of the use of the buoy, holding that he was, and continued.] That being the state of the case as regards these buoys, their lordships cannot think that there was anything like negligence on the part of the master of the *William Lindsay*, in mooring at one of them, *without examining for himself whither there might be latent defects in it. These questions of negligence must be decided by what a prudent and skilful seaman would do under the circumstances*, and by what he is able to do. It is obvious that no man, however prudent and however desirous to be on the safe side, would be able to examine these

buoys, so as to discover whether there were latent defects in them or not. He must, to a certain extent, trust to the sanction which has been given to them by the authorities of the port. No doubt that would not absolve him from all further precaution. He ought not implicitly to trust to that which he cannot to a certainty know is a safe buoy, and he ought to take reasonable precautions, in the event of its not holding him, to bring up, and secure himself from danger. Their lordships think, however, upon this first question, that there was no negligence on the part of the master in mooring to the buoy, and not discovering the defect, which undoubtedly led to the accident."

In The *Nederland* (*supra*), a passenger was injured by the breaking of a block while the ship's crew were in the act of setting the foretrysail. The shoulder of the swivel hook of the block attached to an eyebolt in the deck drew out from the iron strap surrounding the block. Butler, *J.* (p. 927), said:

"For accidents which could not be avoided by such care (resulting from *latent defects* in machinery or some other cause) he was not liable. He was not an insurer. The law is well stated in *Meyer* v. *Railroad Co.*, 14 P. F. Smith, 222. Here the accident occurred from the shoulder of the swivel drawing out of the block, so the witnesses testify and so the libelant says in his statement of facts. This could only occur by reason of some defect in the shoulder, and the shoulder being imbedded in wood and covered by the iron strap which was permanently affixed thereto, this defect could not be discovered."

In the *Flowergate* (*supra*), a grain trimmer, while engaged in rigging a tackle, preparatory to stowing a cargo of grain, was injured by the breaking of an eyebolt set in the deck, to which a block was attached, and in use for the purpose of moving the vessel along the dock. After the bolt broke, a latent defect was discovered below where it was countersunk in the deck. Benedict, *J.* (p. 763), said:

"The evidence is not sufficient to justify finding, as a fact, that the condition of the eyebolt when it was put to use at the time the plaintiff was injured, through its giving way, was such as to inform any one of the fact

that the bolt was already partly broken off. The eye was countersunk in the deck, and the old break was below the upper surface of the deck. This location rendered the defect, in truth, latent. The use of an eyebolt apparently sufficient, but in reality insufficient, solely because of a latent defect, entails no liability for damages caused by such defect."

In the *Benbrack* (*supra*), a stevedore was injured by the breaking of a hook used in raising cotton from the dock and loading it into the hold. The ship was exempted, on the ground that the hook gave way, on account of a latent defect. Hughes, *J.* (p. 688), said:

"The hook which was broken, as described, is brought into court, and it is plain from an inspection of it, that the cause of breakage was a flaw which involves more than half the fractured surface. The defect was a latent one, which was most probably such as would have eluded a close scrutiny, though we have no direct evidence on the subject. The hook had been purchased new in Liverpool; had been spliced to the tackle, during the voyage to Norfolk, to be ready for use, and had been actually used by the stevedores, in stowing this cargo, for five days before it broke and gave way, with the unfortunate result which has been described. The diligence required of the ship, in respect of this hook, was that ordinary diligence which a prudent man is bound to exercise, in conducting his own business. There is no evidence in this case tending to show that the master of the *Benbrack* was delinquent in this respect. * * * The makers and manufacturers of tools and mechanical implements, are responsible for their soundness, but *those who purchase them in good faith, and use them prudently and in ignorance of latent defects, cannot be held to guarantee all others, equally competent with themselves to judge of their quality, against accidents from them.*"

In the *Concord* (*supra*) a stevedore was injured by the giving way of a rung of a ladder, owing to a latent defect, where the rung entered the upright side. Brown, *J.* (p. 915) said:

"The case, therefore, seems to turn wholly on the question whether the ship is liable for the defect in the rung, which made it unfit for this occasional use to which it was liable. The ladder was apparently a firm and strong one. Examination, as the libelant's witnesses

stated, would not or could not disclose this defect of the rung. There is no evidence of any lack of diligence or care on the part of the owners or any of the officers of the ship in respect to these ladders. * * * The case is, therefore, really one of a latent defect not discoverable by any ordinary care or diligence. * * * The liability of the ship and owners to employees, as respects the sufficiency of equipment and appliances, is not that of warranty, as it is in regard to goods, but only for the exercise of due diligence."

In *Riley* vs. *State Line* (*supra*), a stevedore was hurt by the breaking of an iron wheel over which a fall rope passed in use for loading freight into the hold. Spencer, *J.*, who delivered the opinion, said:

"There is no proof that there was any apparent defect in this gin at the time the company furnished it to Cooper [the stevedore contractor] a few days only before, for unloading the vessel. On the contrary, at that time it is shown directly and by the probabilities of the case that it was apparently good, sound and new. It is very true that the gin was in point of fact either defective or insufficient, for had it not been so, it would not have broken; but *it was apparently good and sufficient in the opinion of men of experience and competency to judge.* It was sufficient and the company discharged its full obligation when it furnished to an experienced stevedore a tackle apparently good and sufficient and satisfactory."

In The *France* (*supra*), Wallace, *J.* (p. 480), said:

"The presumption of negligence is often raised by the circumstances of an accident, and it may be a legitimate presumption, that an appliance which gives out while it is being used for its proper purpose, in a *careful manner*, is defective or unfit. How far that presumption may go, in an action by an employee against an employer, to shift the burden of proof from the former to the latter, must depend upon the circumstances of a particular case. The mere fact that the appliance is shown to have been defective, is not enough to do so. *It must appear that the defect was an obvious one, or such as to be discoverable by the exercise of reasonable care.*"

In the *Bergenseren*, 36 Fed., 700, Brown, *J.*, decided that an empty rivet hole in a bulkhead between the fire-

room, and a water ballast tank, in which "wet" cargo was stowed—the location of the hole being down below the floor in the fire-room and thus out of the reach of ordinary inspection—was a latent defect.

(e.) It is obvious that in most of the foregoing cases, the defect which resulted in damage, would have been discoverable by the exercise of a high degree of diligence. The decisions hold, however, that a shipowner is not liable for such defects as are not discoverable by the eye, or by handling in the way of usual inspection. They are in line with *Christy* v. *Griggs*, 2 Campbell, 79, where the axletree of a coach snapped and the plaintiff was injured in falling. Lord Mansfield there held:

"That as the driver had been cleared of everything like negligence, the question for the jury would be as to the sufficiency of the coach. If the axletree was sound *as far as the human eye could discover*, the defendant was not liable."

To the same effect is the Scotch case of *Anderson* v. *Pyper*, 2 Mur., 261, 270, where it was held the following charge was proper:

"You are to say whether there was such appearance of defect *as the eye of an artificer, applied with reasonable attention, could discover*, and will take into consideration that the eye of an experienced person might discover defects imperceptible to others." This was consequent on a ruling, "The rule then is that if the carriage is sound as far as the human eye can discover, the proprietors are not liable."

In *Texas Pacific Ry.* v. *Barrett*, 161 U. S., 617, 618, this Court approved an instruction: "That a railway company is not required to adopt extraordinary tests for discovering defects in machinery which are not approved, practical and customary; but *fulfills its duty in this regard, if it adopts such tests as are ordinarily in use* by prudently conducted roads engaged in like business and surrounded by like circumstances."

Under the principle laid down in the foregoing cases, the appellant cannot contend that the defects in the

rivet testified by her own witness to have been latent (p. 45), were not in fact latent, unless she satisfies the Court, by competent evidence, that it was discoverable by the exercise of ordinary care (*Rapho* v. *Moore*, 68 Pa. St., 404, 408; 12 *Am. & Eng. Enc. Law*, 924, 925).

(**f**.) There is no proof that ordinary diligence in inspection called for a water test.

The suggestion of counsel that the defect in the rivet should not be considered to be latent, because, by filling the tank in Trinidad, the rivet might have been broken so as to make its defect patent, is not supported by any evidence that this was such an usual and customary precaution as should have been taken by a reasonably prudent and careful master.

The only evidence in the record of a usage to test tanks in this way is that which relates to tests made by builders. Though the libelant examined a number of witnesses who would have been experts on this subject, no attempt was made to prove by any of them the existence of such a usage or custom as applied to the facts of this case; and it is not believed that any such usage exists. Unless it is made to appear that such custom does exist, and that the captain neglected to conform to it, how can it be said that he was guilty of such want of care in inspection as would deprive the ship of the benefit of the exemption from latent defects?

(**g**.) It is submitted with deference that the Court ought not to lay down a rule that a particular kind of test should be adopted in regard to such a matter, without evidence of some usage or custom which has been disregarded.

The business of commerce is carried on largely in vessels which contain tanks. Certain rules no doubt exist with regard to periodic examinations of them, and for their survey and examination for purposes of safety and for classification (see the *Sandfield*, 79 Fed., 371, 375). Yet the record is absolutely silent on this whole subject.

It is known that the charter value of vessels, and the

insurance premiums of cargoes carried upon them, are regulated largely by the standing of vessels in the classification registers. Presumptively, the course of business between ships, shippers and underwriters, is adjusted and based upon the existing practices, and upon compliance with the rules adopted by experts who compose the committees of the classification societies. The fact, therefore, that no evidence has been adduced tending to show any usage or custom to apply a water test to a vessel which had been tested by hydrostatic pressure three months before, leads naturally to the inference that no such custom exists. Certainly, the record fails to show that any *does* exist, and, in the absence of such proof, there is no evidence upon which the Court can say that the Master did not exercise due diligence or care in examination of the bulkhead, after the hurricane, when he relied on the careful manual and visual examination of it by the engineer (pp. 43, 44, 45, 46), instead of applying a water test (see The *Warren Adams*, 74 Fed., 413, 416; The *William Lindsay*, L. R., 5 P. C., 338, 343.)

(**b.**) The evidence of the engineer, libelant's own witness, as to his examination of the bulkhead after the storm, is as follows:

(P. 43.) "Q. Did you examine the ship *after* the hurricane? A. I did, sir.

Q. *Where?* A. *Forepeak.*

Q. Where else? A. Engine room, stoke holes in the sides of the ship and tank bilges.

Q. Did you go down into the tank in the forepeak? A. Yes, sir.

(P. 44.) Q. What time of day? A. Between nine and ten o'clock in the morning.

Q. Did you make an examination of the interior of the tank? A. Not a practical examination. I made an examination just to satisfy myself, to have a look at the formation of the tank principally; it was the first time I had seen it; *I didn't go with the intention of examining whether there was any damage or not, but I made that my business when I was down there.*

Q. Did you examine to see whether there was any damage? A. Yes, sir.

Q. Did you look at the collision bulkhead? A. Yes, sir.

Q. Did you look at the knee tie? A. Yes, sir; *wherever there were rivets.*

Q. Was there any *coating or wash* on the forward side of the bulkhead? A. Yes, sir, *a coating of Portland cement.*

Q. *Was that over all the rivets?* A. *The rivets* and the bulkhead as well.

Q. Did you notice that any rivets were started on the inside? A. I couldn't tell that any had been started.

Q. *Had the cement been started?* A. *Not that I could see.*

Q. You say you examined wherever there were rivets on the inside of the tank? A. Yes, sir.

Q. How long were you down there? A. Upwards of an hour.

(P. 45.) Q. On what day was it that you went down into this tank first after this storm? A. On the morning of the 22d of August.

Q. The vessel was then at sea? A. Yes, sir.

Q. Did anybody go with you? A. No, sir.

Q. And it was your first visit to the interior of the tank? A. Yes, sir.

Q. How did you get down into it? A. Through a manhole door.

Q. Was there a ladder to go down into it? A. Yes, sir; three ladders.

Q. Inside? A. Inside.

Q. Permanent? A. Permanent ladders.

Q. *Did you carry lights with you?* A. *I did.*

Q. In what shape? A. In the shape of a *torch and a lantern.*

Q. And you say you found it all lined with Portland cement? A. Yes, sir.

Q. How thick was that lining? A. A heavy wash—washed with a solution of cement in paste form.

Q. What would you take that to mean in thickness, a heavy wash? A. It materially differs; depends upon the surface it is put on. *Put a coat of cement about one-sixteenth of an inch thick,* and *about the rivets would be thicker and clumsier.*

Q. You found nothing to indicate any starting of the cement? A. According to appearances.

(P. 46.) Q. Well, you saw it and you are telling us what you saw? A. Yes, sir.

Q. Was there cement on all the sides of the tank as well as the bulkhead? A. Yes, sir.

Q. And on the floor of it? A. There is no floor in it.

Q. It comes down to a flat surface on the bulkhead side,

doesn't it? A. No, sir: it is wedge shaped at the bottom of the ship.

Q. Was that portion of the tank which formed the bottom of the tank also covered with cement? A. Yes, sir; not only with a wash but with a body of cement.

Q. Was the top of it, which is the underside of the between decks there, also washed with cement? A. I am not sure of that.

Q. Could you, by means of these ladders, examine every portion of that interior? A. Yes, sir; and without the assistance of the ladders.

Q. Why, part of it is twenty feet high, isn't it? A. Yes; but you have got intermediate stringers that you could stand on.

Q. *This particular beam to which this angle iron is attached is inside of this tank?* A. *Yes, sir.*

Q. *At what height above the bottom of the tank is that beam?* A. *From the ship's bottom?*

Q. *Yes?* A. *Six feet or more.*

Q. *Did you look at that beam at all?* A. I *was on top of it.*

Q. Was that also covered with cement? A. Yes, sir.

Q. *Was the cement perfect there?* A. *Apparently.*

This was a fair, full and careful examination, calculated to detect the evidence of any undue straining of the bulkhead if it had then existed.

(**i.**) In the absence of evidence that other tests were usual, it will be presumed that the inspection made was reasonably sufficient. After such an inspection, the master was justified, as we submit, in assuming the bulkhead was still in the condition in which it left the builders' hands.

In the *Warren Adams*, 74 Fed., 413, where the insufficiency of an inspection of a vessel, prior to sailing, was in issue, the Court of Appeals of the Second Circuit said (p. 416):

"Besides the presumption afforded by the circumstances referred to [another adequate cause of damage], the examination of the shipwright, made just previous to the commencement of the voyage, is evidence which ought not to be ignored. Although he did not make an examination of all the seams in the centreboard trunk, it is reasonable to assume that those he did examine were in

such condition as to justify an experienced man in believing a more critical inspection was not necessary."

In the *Sandfield*, 79 Fed., 371, the District Court for the Southern District of New York considered the question of a shipowner's diligence in connection with a latent defect in a rivet in the ship's side. It was claimed that an examination in dock would have disclosed the defect. Brown, *J.* (p. 375), held:

"*There is not sufficient evidence* to warrant my finding that there was any lack of diligence in the inspection of the ship. The vessel was comparatively new, and built by first-class makers. She passed her first Lloyd's survey in February, 1895, when the whole bottom was inspected and the riveting found sound. No accident intervened. Diligent care of a ship does not require redocking more than once a year, in the absence of some known necessity for it, and at the time of this voyage a year had not expired since the last docking."

A similar matter was before Judge Brown in the case of the *Ailsa* and *Bourgogne* (76 Fed., 868, 876), where it was claimed *in argument* that a steamer outward bound from New York, seeing fog ahead, should have stopped at the Upper Quarantine, instead of attempting to proceed through the Narrows. Other vessels had gone through the Narrows in the fog. In disposing of the point, the Court said:

"This contention rests on the argument of counsel, and not upon any expert testimony, and it is too much to ask the Court to pronounce such a judgment, *in the absence of any expert testimony whatever*, and in opposition to the practical testimony of so many pilots acting under so high responsibilities."

So in the present case the Court is asked to declare, in opposition to the practical testimony of the three experts in charge of the navigation, that a certain kind of inspection test should have been adopted, though there is no evidence, expert or otherwise, that such a one was demanded by the circumstances. The Court may fairly decline this responsibility.

The counsel in the lower courts contended that the hammer test should have been tried on the rivets at this time. It is observed, however, that the present counsel concedes such a test was not called for (Supplementary Brief, p. 7), but only the water test. Nevertheless, the hammer test is a good test—one of the two employed by builders; and if the libelant could justly demand that one of them should be used, no reason is perceived why she should deny herself the luxury of the other.

(**j**.) The uncertainty that a water test in Trinidad would have disclosed anything is so great as to make it impossible to say, with any positiveness, that the failure to adopt it amounted to negligence.

It could not have afforded any information of latent defects, unless the rivet broke under the test.

If the tank, filled as it was at sea with the ship rolling, contained the water for a period of thirty-two hours, as Captain Legge claims (p. 27), and as the engineer's log states, it is reasonably certain that filling it in Trinidad would not have disclosed anything; while if it really broke in the filling of the tank, the opposite inference does not arise, because a far greater strain would necessarily be put upon the tank in filling it at sea with the ship rolling than would have been by filling it in port with the ship still. Hence, the fact that it broke in one case does not satisfy the mind that it would have broken in the other; and unless it is reasonably certain the test would have amounted to something, there could be no negligence in failing to use it.

(**k**.) The fair conclusion from the evidence seems to be that the defects in the rivet were hidden, and not discoverable by the ordinary or usual modes of inspection, which were all the master was bound to adopt, and hence were "latent," within the meaning of the exception. To press the duty of inspection, or of testing to the extent demanded by the appellant, would be, in effect, to substitute another kind of warranty, equally as stringent, in place of the warranty of seaworthiness, from which the shipowner

had sought and obtained relief by the exception of "latent defects."

IV.

The evidence discloses no sufficient reason for depriving the shipowner of the benefit of the exception of "latent defects." He had used diligence to make the ship seaworthy for the voyage, and she was seaworthy, in fact, when she sailed.

(**A.**) The burden of proof rests upon the libelant to defeat the operation of the exceptions.

In *York Co.* v. *Central Ry. Co.*, 3 Wall., 107, 112, Mr. Justice Field, delivering the opinion of this Court, said:

"Nor do we perceive any good reason, on principle, why parties should not be permitted to contract for a limited responsibility. The transaction concerns them only; it involves simply rights of property; and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation, in face of a special agreement for its relinquishment. By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire."

The decisions of this Court also hold that where such a contract for modified responsibility exists, then the loss falls within the exception. The burden of proof is shifted upon the shipper to defeat the operation of the (*Clark* v. *Barnwell*, 12 How., 272, 280; *The Victory and the Plymothian*, 168 U. S., 410, 423; *Transportation Co.* v. *Downer*, 11 Wall., 129; *Railroad Co.* v. *Reeves*, 10 Wall., 176, 189, 190).

The rule as to the burden of proof is the same, though a breach of the implied warranty of seaworthiness be alleged.

In the *Miranda*, L. R., 3 A & E., 561, 567, Sir Robert Phillimore ruled to this effect:

"This exception which is contained alike in all the bills of lading, though not always expressed in precisely the same words, is as follows: 'Accidents from machinery.' If I had to determine the case upon the point raised with reference to the alleged implied warranty of seaworthiness, I should rule that the *burden of proving the breach of such warranty rests with the defendants* [*cargo owners*], and that sufficient evidence as to the vessel's state, and the state of her machinery, has not been given to lead the Court to find that she was in an unseaworthy condition at the time the cargo was shipped. But I think the true question in the case is: Does not the exception 'accident from machinery' include the present case? I think that I must come to the conclusion that the accident in question finds its place among the excepted perils; it is, therefore, unnecessary for us to discuss the able argument which has been addressed to the Court, with respect to a warranty of seaworthiness being implied in the contract."

(**B.**) The shipowner exercised care and diligence in the construction of the vessel, only a few months before this voyage.

The Carib Prince was substantially a new vessel. She was built to order three months before this accident for Mr. George Christall, who operates a line of steamers, known as the *The Trinidad Line*, from New York to Trinidad (pp. 148, 7). She was an all steel steamer, of 1,304 tons net register, and of 2,500 tons dead weight capacity (p. 155). She was built by builders of the highest reputation in England, and at an expense considerably in excess of the usual cost of vessels of this class (p. 138). She was designed to be, and was, an exceptionally fine ship.

The utmost diligence was used by the owners to have her built well and by the builders to have this particular bulkhead properly erected and soundly riveted. The specifications for the vessel generally and for the riveting, bulkheads and water-testing were very stringent (pp. 157, 158), and were in excess of the requirement of Lloyds' Register (pp. 79-81). She was built in accordance

with these specifications (pp. 84, 79, 62, 184), by builders of good standing (pp. 13, 53), under the supervision of a Lloyds' surveyor, and the owners' architect and surveyor (pp. 74, 79, 68). The workmanship about the vessel was very good (p. 52).

The builders obtained and used the rivets most widely used in England (p. 57). Not every one, indeed, but enough of them were tested as to quality by bending them cold and flattening them cold (pp. 57, 58). The rivet holes were spaced according to Lloyds' rules for watertight work (p. 59), five and a quarter inches from centre to centre (p. 64). Wherever the holes in the plates were not perfectly fair, they were rimed out with a rimer (pp. 60, 66, 72, 77, 82), until they were fair, and then a larger rivet was inserted, one of seven-eighths of an inch instead of three-quarters of an inch diameter (p. 67). The "drift pin," which libelant's expert Quinn ignorantly supposed was used to stretch five-eighths inch steel plates so as to make untrue holes fair, was not used in any such way, nor for any such purpose. "It is put through to clean the hole when "necessary; it is put in oily waste and put through to see "that the thing is perfectly clear" (pp. 65, 60, 71, 81, 82).

The men who did the riveting in this tank were specially selected for their skill in watertight work, and some of them men of thirty years' experience (pp. 62, 70, 74, 77), and their work was supervised generally by one of the builders (p. 57); immediately by a foreman riveter of eighteen years' experience (pp. 62, 64), by the owners' inspecting surveyor who was at the ship about three hours a day (pp. 68, 70); by a Llyods' surveyor (p. 74), who was there nearly every day and saw much of the riveting done (p. 75); and by the owners' architect (p. 79), who visited the ship two or three times a week (p. 81), and saw the rivets after they were headed up.

Every rivet on the bulkhead was tested with a hammer both by the foreman riveter (p. 63) and by the owners' inspector (p. 69), and nearly every rivet was subjected to the like test by Lloyds' surveyor (p. 74). This test it is proved and not denied, would have detected any material crystalization of iron in a rivet from too much hammering; but on the tests, no such rivet was found (p. 69).

This evidence seems to be conclusive that the tank was sound and fit when completed, and that any defects in it were of such a minor character as not materially to impair its strength.

The bulkhead was further twice tested with the water test in presence of Lloyd's surveyor (pp. 74, 63, 58, 69, 79). The tank was filled and a hydrostatic pressure of $96\frac{3}{4}$ tons was put against the bulkhead. This was in excess of Lloyd's requirements (p. 79). The pressure thus exerted on the bulkhead was increased by the fact that the vessel was then lying on an incline of five eighths of an inch to the foot, or more than ten feet by the stern (p. 69). The bulkhead under these tests showed no sign of weakness or leaks (p. 80).

(**C**.) The interior face of the bulkhead was carefully inspected prior to the commencement of the voyage in question.

The evidence of the engineer as to the nature and extent of his examination is set out (*ante*, pp. 44, 45). It appears that he made as careful an examination of that side of it as was possible; that he saw no signs of strain, and that there was nothing to be seen there which indicated to a practiced eye that the bulkhead had suffered from strains or been weakened since it was tested in Sunderland three months before.

There was no proof tending to show that a different kind of examination or test should have been made (*ante*), or that if made, it would have shown anything further than was indicated by the inspection the engineer did make, namely, that the bulkhead seemed to be intact and sound.

(**D**.) *The steamer was, as a matter of fact, reasonably fit for the voyage.*

There was no charge of unseaworthiness in the libel as originally filed, nor has it been amended so as to embody such an allegation. Nevertheless, in argument, two grounds of unseaworthiness have been pressed in all the courts: (1), with regard to the limber boards, and (2), in respect of the rivet. Both of the courts below found there

was no unseaworthiness with respect to the limber boards, but both held the ship was unseaworthy in respect of the rivet, though such finding was accompanied by the conclusion that the steamer was relieved from liability by the exception of latent defects, which was directed to that form of unseaworthiness, and included it. Both of the lower Courts erred, as we submit, in holding the vessel was in any degree unseaworthy.

(1.) So far as concerns the limber boards there is little difficulty.

If they had been watertight, this would have been a remote, and not the proximate cause of the damage. Moreover, the tightness of the limbers could only have affected the *degree* of the damage. Libelant claims that there were four feet of water in the hold on the morning when the leak was discovered. Probably there were less than two feet (pp. 17, 110). But even that much must have overflowed the bilges, which were only from fifteen to eighteen inches deep, and have caused damage by swashing about.

It is unnecessary, however, to concede any fault with regard to the limbers. Libelant's arguments in respect of them proceed upon a misconception as to their purpose. They are not put over the bilges for the purpose of allowing water to drain from the upper part of the hold downward, but are to prevent that which may be in the bilges from causing damage by swashing *upward*. They form a water-course for such water as may enter the sides of the ship to flow aft to the pumps (Congdon, p. 136).

Moreover, the limber boards were *not* watertight. Captain Legge said (p. 10):

"The limber boards are laid there, but *not tight*."

(P. 15): "I don't know that there is any law that they should be tight; they are ordinary planks, and made to fit in; *they are not watertight;* water might get in, and water might not."

Q. I suppose you don't know whether some of the water went in or not, do you? A. No, I don't know."

The man who did know was the carpenter, Hopkins, whose business it was to attend to them. He testified (p. 109):

"I bored holes to let the water run *more freely* in the limbers * * *

Q. Did you take out the limber boards when you got to New York? A. Yes, sir. I do every voyage, to see if it is quite free for the water to run into.

Q. How tight were those limber boards? A. About middling, I should say; just a nice fit.

Q. Will water run through when they are down? A. Yes.

Q. Do you remember how tight you found them when you got to New York? A. Nothing to speak of. Just as usual."

He further says he cleared away the cargo from over the limber boards; and (p. 111).

"Q. And you *saw the water gurgling and going down?* A. *Yes, sir.* I thought it wasn't going *fast enough*, so I bored holes."

Libelant has no proof to contradict this evidence. It does not appear but that the bilges may have been substantially full of water before the carpenter bored the holes. Of course, when the sluice cock on the bulkhead was opened and the pumps started on the pipe line, the water that was in the bilges quickly drained out. The function of the holes was to permit a more rapid drainage of the accumulated water than that which would pass through the ordinary cracks of the limber boards. The limbers were built in the usual way, and no more tight than usual. The evidence shows nothing to the contrary. A single word in the captain's testimony on which the appellant relies (p. 13), that the water remained in the hold until the holes were bored, does not prove that it stayed there for the want of an outlet. He says distinctly (pp. 10, 15) that he did not know about that. What he probably meant was that some of the water remained in the hold until after the holes were bored. But that was because the pumps were only started a few moments before that time.

The cases cited by the appellant in this connection (*Sup-*

plemental Brief, p. 2) are not in point. They are all cases where water which had reached the bilges could not be got out because the drain holes through the ship's limbers *under the floor* were stopped with accumulations of various kinds, or because the pumps were defective.

Thewater, in this case, was confined in the hold because it was a watertight compartment, whose pumping outlets were kept closed for purposes of safety, except when the periodic soundings were taken. This is the usual custom. As soon as the water was discovered the pumps were started and the holes bored to allow the water to run out faster. It was going through the limber boards before the carpenter bored any holes (pp. 109, 111). If he had left it to flow out in the ordinary way this contention about the limber boards would never have been thought of.

(**2**.) The defects in the rivet were not such as to justify a finding of unseaworthiness.

(**a**.) The finding of the lower Courts was, in effect, that the implied warranty of seaworthiness called for a perfect vessel—not merely one reasonably fit for the purpose. The condition of unseaworthiness was assumed to follow from the mere fact that the rivet broke, and when broken disclosed a latent defect. The Court virtually held it was a case of *res ipsa loquitur*. But the doctrine of *Work* v. *Leathers*, 97 U. S., 379, does not apply when there has been another adequate cause for the breakdown. In the present case adequate cause *did* exist in the negligence which attended the filling of the tank (*ante*, pp. 21, 23).

(**b**.) The true test of seaworthiness is to inquire whether, if all the facts had been known while the vessel was at Trinidad, practical and experienced men would have agreed she was reasonably fit to make an ordinary voyage without damage to cargo.

There is no hard and fast rule by which seaworthiness can be determined. It must be determined with reference to the judgment of competent and prudent experts, versed in such matters and upon previous experience

(The *Titania*, 19 Fed., 101, 105, 106, 107, Brown, *J.*; Union Ins. Co. *v.* Smith, 124 U. S., 405, 425; *Eastern Transportation Line* v. *Hope*, 95 U. S., 298; Taney Rep., 126; *Adderley* v. *Am. Mut. Ins. Co.*; *Svendsen* v. *Starsberg*, 31 Fed., 86; *Janney* v. *Ins. Co.*, 10 Wheat., 411; *Rev. Stat. U. S.*, Secs. 4556–4561).

Seaworthiness in the hull of a vessel requires nothing more than reasonable fitness for the voyage. In *Steel* v. *State Line*, 3 App. Cas., 72, Lord Cairns said:

"By 'seaworthy' I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and loaded in that way, may be fairly expected to encounter in crossing the Atlantic."

In *Dupont de Nemours* v. *Vance* (19 How., 162, 167), Mr. Justice Curtis defined this obligation as follows:

"To constitute seaworthiness of the hull of a vessel, in respect to cargo, the hull must be so tight, staunch and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage, without damage to the cargo under deck. If the vessel during the voyage has leaked so much as to injure the cargo * * * one mode of testing seaworthiness is to ascertain what defects occasioning leakage were found in the vessel at the end of the voyage, and then to inquire which of those defects are attributable to perils of the seas encountered during the voyage, and which, if any, existed when it was begun; and if any of the latter be found, the remaining inquiry is whether they were such as to render the *vessel incompetent to resist the ordinary attacks of the sea* in the course of the particular voyage, without damage or loss of cargo."

In The *Titania*, 19 Fed., 101, 107, Brown, *J.*, stated the rule:

"The question of seaworthiness, therefore, as regards the implied warranty in favor of the insurer or the shipper of goods, is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons, versed in such matters. If judged by this standard, the ship is found in all respects to have been reasonably

fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is legally attributable to the ship or her owners. * * * It was long ago held (Amies *v.* Stevens, 1 Strange, 128) and is laid down in Abbott on Shipping (* p. 389) as elementary law, that 'if a vessel, reasonably fit for the voyage, be lost, by a peril of the sea, the merchant cannot charge the owners by showing that a stouter ship would have outlived the peril.' This principle applies equally to the stowage of the cargo."

In the *Rover*, 33 Fed., 515, 521, Brown, *J.*, in dealing with the question of latent defects, as affecting unseaworthiness, stated his conclusions as follows:

"Seaworthiness does not require perfection in machinery, more than in anything else. Perfection is unattainable. Only a reasonable fitness for the service designed is required (*Gibson* v. *Small*, 4 *H. L. Cas.*, 353; *Readhead* v. *Midland Ry. Co.*, *L. R.*, 2 *Q. B.*, 412, 440; *Burges* v. *Wickham*, 3 *Best. & S.*, 669, 692). In the case of *The Titania*, 19 *Fed. Rep.*, 101, 107, in reference to latent defects, it was said: '*The ship would be deemed seaworthy if, all the circumstances being known, she would still be deemed by competent persons, according to the existing knowledge and usage, seaworthy and reasonably fit for the voyage, although subsequent experience might recommend additional precautions.*' The rule as respects latent defects doubtless operates harshly upon shipowners. It cannot justly be pressed, as it seems to me, beyond the limitations above indicated; and *the first condition of the application of the rule must be proof, with a reasonable degree of certainty, of the fact that such defects did exist as, if known, would have been deemed to render the ship, as respects the defective subject matter, not reasonably fit for the service designed.*"

(**c**.) Applying these tests to the present case, the vessel was reasonably fit.

It is plain that the exterior hull was perfectly fit for the voyage. The only question relates to the rivet in the bulkhead. Suppose it had been known to a competent board of survey called in Trinidad to furnish a certificate of seaworthiness for the voyage, that one of the rivets in the tank had a slight cant, passed through holes that were just a shade out of line, and that its strength was im-

paired by the cystalline character of the iron, due to an excess of hammering in construction; is it to be presumed that they would have said the vessel was unseaworthy to make a voyage? Would they have said the mere inequality in the strength of a single rivet in this partition of the hull rendered the ship unseaworthy? They might have said, if they were in doubt, that water should not be carried in the peak tank with cargo in the adjoining hold. Proceeding in that way she would have been seaworthy. If they had furnished a certificate with that qualification, and the captain had afterward negligently filled the tank, would the Court say that the proximate cause of the damage was unseaworthiness, rather than the improper management of the tank? (Lord Esher, in *Hedley* v. *Pinkney* [1892], 1 Q. B., 56, 65).

It seems obvious that the ship would not have been unseaworthy if the rivet had been entirely out of the hole—provided that fact had been known. The vessel required no ballast in the peak tank on the voyage; its use was a mere whim of the captain—a thing he had never done before (pp. 22, 23).

Is the question as to the seaworthiness of the vessel to be answered in any different way because the captain was ignorant of the defect in the rivet? If as a reasonably prudent master he was justified in filling the tank at sea, and was justified in assuming that the rivet was without defect, knowing, as he did, that it had withstood the usual test for strength three months before, and that his engineer had examined it carefully after a storm on the preceding voyage and found no evidence of strain,—of course no question of unseaworthiness can arise. The case would then be one of damage from a latent defect which did not amount to unseaworthiness. But, if he was not justified in assuming the soundness of the bulkhead, its unsoundness was not the proximate cause of the damage, but rather his negligence in doing an act which *ex hypothesi* was improper; and such act, rather than the condition of the rivet, should be deemed the proximate cause of the loss. The case would then be one of neglect in the management of the ship, within the exception of the bill of lading (*Steel* v. *State Line*, 3 App. Cas., 72,

82, 90; *Hedley* v. *Pinkney* [1894], App. Cas., 222, 227, 228).

(**d.**) The alleged defect of untrue rivet holes is insufficient to justify a finding of unsoundness (The *Rover*, 33 Fed., 515, 521).

The evidence with regard to the holes has already been referred to (*ante*, p. 33). The irregularity complained of from a sixteenth to an eighth of an inch according to libelant's witness Quinn, was not unusual, was not such as would be rejected if the real conditions were known, but would be passed as good work (p. 115). The holes, however, were not as much as an eighth of an inch out of line. The testimony of the builders (p. 67) shows that where the holes were out of line they were rimed out until they became true, and were then stopped with a larger sized rivet. It is proved, and not disputed, that the rivets put through these holes originally were three-quarter inch rivets, and that the holes were three-quarter inch holes Mr. Congdon testifies that the holes could not be injured in any substantial degree, otherwise the rivet could not be put through (p. 56). The Court will also take notice that the men could not have put their fingers though in the way they did (p. 33), if the holes had been materially injured. The claimant's evidence shows that the way the rivet went through the holes was not of itself a source of weakness (p. 85); and the libellant's evidence shows that if it was weakened at all from being got through injured holes, it would be weakened through the centre, and would break off there (Quinn, p. 115), which this rivet did not do.

A similar point was before the District Court of New York, in the *Sandfield*, 79 Fed., 371, where Brown, *J.*, disposed of it as follows (p. 375):

"It is also likely enough that the cant given to the rivet by driving it through the overlapping holes which were not quite true, and the cant given to the clinch at both ends might diminish its endurance, by subjecting it to an unequal strain, and increasing the injurious effects of the vibration of the plates against it. If such was the fact, *any such mere inequality in the strength of the rivets does not amount to unseaworthiness*, or a violation of the

provision of the charter that the ship shall be 'tight, staunch and strong.'"

(**c**.) The degree in which the strength of the rivet was impaired by the excessive hammering which resulted in crystallization is purely speculative, but the fair weight of the evidence indicates that it was not so impaired as to make the rivet unsound.

We have the evidence of care in the selection of rivets, in the method of making the holes true, in the mode of riveting, and the fact that it withstood a test for soundness which exceeded Lloyds' requirements. These facts create a strong presumption of the seaworthiness of the rivet.

The seaworthiness of a ship regularly employed in commerce, is to be assumed as a fact, in the absence of countervailing facts (*Pickup* vs. *Ins. Co.*, 3 Q. B. D., 594; *Lunt* vs. *Ins. Co.*, 19 Blatchf., 151, 155; *The Rover*, 33 Fed., 515, 520; *The Warren Adams*, 74 Fed., 413, 415; 163 U. S., 79.

This presumption is not rebutted by the mere fact of breaking, nor by the crystalline appearance of the iron, when an adequate cause for the accident is found in the wrong way the tank was filled. In the circumstances, as two possible causes of damage exist, the libelant has the burden of showing that the real cause was one for which the ship is liable (The *Exe*, 14 U. S App., 626), and if that be left in doubt, she should not recover (*Searles* v. *M. R. Co.*, 101 N. N., 661; *The R. D. Bibber*, 8 U. S. App., 42, 47; *Muddle* v. *Stride*, 9 Car. & Payne, 380).

V.

The exception of latent defects in hull, machinery or their appurtenances, imports a modification of the implied warranty of seaworthiness. It covers the loss and exempts the ship.

It is assumed in this branch of the argument that the evidence of pains and care taken in the construction and

testing of the vessel a few months before this voyage (*vid. ante*, pp. 50, 51), and again in inspecting it after the storm of the previous voyage (*vid. ante*, pp. 44–46), were sufficient to justify the belief that the vessel was reasonably sound and fit for the service, and that, there is no evidence of any default on the shipowner's part that would prevent the operation of the exception. Both of the courts below have found to this effect (Rec., pp. 168, 212).

This exception is broad and specific enough to exempt the vessel from the damages, whether the defect in the rivet amounts to unseaworthiness or not. It is plain and unequivocal; and is the usual form of exception from latent defects that is found in the great majority of ocean and inland bills of lading (*vide* The *Sandfield*, 79 Fed., 371).

(**1**.) The appellant argues that the *Caledonia* (157 U. S., 124) is opposed to the contention that this exception may be viewed as a modification of the implied warranty of seaworthiness. It is desirable, therefore, to point out the essential points of difference between the two cases.

The grounds on which the decision of the Caledonia proceeded are: (*a*) that the exception of "steam, boilers and machinery, or defects therein," was not sufficiently definite and specific to be a modification of the implied warranty of seaworthiness; and (*b*) that as the exception formed part of a long enumeration of excepted causes of damage, all the rest of which related to matters subsequent to the beginning of the voyage, this one must be treated as equally limited in scope.

(**a**.) The exception of "*latent defects in hull, machinery or their appurtenances*," contained in this bill of lading, is more specific and definite than that of "defects in machinery" in the Caledonia case.

The exception now under consideration is an express modification of the implied warranty of seaworthiness, in the ordinary meaning of words. Though stipulations in

bills of lading are construed most strongly against the shipowner, nevertheless, this doctrine is not to be carried to the extent of substituting for the plain intention of the parties as fairly expressed in their contract, a fictitious presumption of their intention.

This was well put by Rigby, L. J., in *Baerselman* v. *Bailey*, 8 Asp. Mar. Cas., 4, 5: "Now if there be any ambiguity in the bill of lading, the document ought unquestionably to be construed against the shipowners. *But the true rule is first to see whether there be any ambiguity or not.*"

The aim of the Court must be, as stated by Lord Halsbury, in *Hamilton* vs. *Pandorf* (12 App. Cas., 518, 524), "*To give effect to all the words that the parties have used to express what this bargain is*"; or, as stated by Mr. Justice Nelson, in *Bulkeley* v. *Naumkeag Co.* (24 How., 386, 394): "*We must look to the substance and good sense of the transaction;* to the contract as understood and intended by the parties, and as explained by its terms, and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained in order to determine the scope and extent of them."

Looking to the "substance and good sense of the transaction," we find that the words employed were apt to relieve the shipowner from defects existing in the ship at the time the contract of carriage was entered into; that the implied warranty of seaworthiness, as a warranty against latent defects, is a "harsh" rule (Brown, *J*., in the *Rover*, 33 Fed., at p. 521), from which the shipowner would naturally desire to be relieved; and that the mutual intention to give such relief would be quite natural in view of the fact that Congress, by the Harter Act (*post*, Appendix), has given relief from the implied warranty of seaworthiness in a large class if not in all cases.

It is to be presumed that insurance policies have been or will be reformed to meet the risks put upon cargo by the Harter Act, and that insurance against latent defects is now readily obtainable. The cargo owner receives

a consideration for the exception in a diminished rate of freight (The *Wells City*, 61 Fed., 857, 859).

The four Judges who have already heard this case have concurred in holding that the exception of latent defects was an express modification of the implied warranty of seaworthiness. Benedict, *J.* (p. 168), held:

"The law of England as declared in the case of the Cargo *ex Laertes* (12 Prob. Div., 187), is to the effect that by the laws of England, such an exception as that contained in the bill of lading sued on, if it does not abrogate, at all events limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the vessel, if due diligence is exercised by the ship owner. Applying that law to this case, it follows from the fact that the weak condition of the iron rivet could not be discovered by the exercise of due diligence, that the ship cannot be held liable for the injury to the libelant's cargo because the danger arose from a latent defect in the rivet which gave way, within the exception of the bill of lading, under which the merchandise was carried."

Shipman, Circuit Judge, delivering the opinion of the Court of Appeals (p. 212), said:

"The bills of lading in these cases exclude losses arising from latent defects in the hull, and the question is, whether this language does not necessarily mean defects existing at the time of shipment, and therefore whether it does not clearly and even expressly exclude unseaworthiness arising from such defects. The only case in which the effect of an exemption of latent defects is discussed, is the *Laertes*, 12 Prob. Div., 187, but in that case, the language of the bill of lading was 'latent defects * * * even existing at time of shipment,' so that the intention of the parties to limit the implied warranty was manifest. In the cases at bar, it is urged that 'latent defects' must necessarily mean those existing at the time of shipment, and that any other construction is exceedingly strained. A defect in order to be latent must have been undiscoverable at the time of the shipment. It could not in its nature have been capable of discovery then, and have become capable of evading discovery subsequently. A construction which should say that 'latent defects'

meant only those which had become latent since the vessel left the wharf, and could not mean previously existing defects, savors of the distinctions of the school men; and if latent defects existing upon the voyage are exempted, those existing at the time of shipment are included, for they are the same. We concur with the experienced District Judge that the exception 'limits the warranty which the law would otherwise imply that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the owner.'"

We submit with deference, that the exception in the *Laertes* case, of "latent defects, even existing at time of shipment," expresses no further thought than the simple exception of "latent defects." The word "latent" speaks in the present tense. *Latens*, the present participle of the verb *lateo*, from which we derive the adjective *latent*, means "lying hidden." In the Standard Dictionary *latent* is defined as "Not visible or apparent; *with the implication of existence and potential activity;* concealed, hidden, dormant, as latent powers. * * * latent ambiguity." A *latent defect* is, necessarily, an existing, lurking, inherent defect. To say, as was said in the *Laertes*, that the ship was exempted from "latent defects, even existing at the time of shipment," is simply to say the same thing twice.

When the words "latent defect" are put in a bill of lading, they mean hidden defects existing at the time of shipment; for the bill of lading then attaches to the goods and its exceptions relate back to that time and exempt the ship from damage from all excepted causes happening thereafter (*Baerselman* v. *Bailey* [1895], 2 Q. B., 301).

Carver, Carriage by Sea, S. 58, states this rule as follows:

"When, however, a bill of lading has been given and taken, its provisions must be considered to relate back, and apply to what has been done in regard to the shipment before it was given. It is to be taken as the expression of the contract under which everything has been done. Thus, the exceptions of risks contained in it apply to the stowage of the goods, although that may have been

completed before the bill of lading was given (citing the *Duero*, L. R., 2 A. & E., 393; *Pyman* v. *Burt*, 1 Cab. & E., 207; *Norman* v. *Binnington*, 25 Q. B. D., 475, 478; *Nottebohm* v. *Richter*, 18 Q. B. D., 63)."

Other authorities holding to this effect are The *Carron Park*, 15 P. D., 203; *Scott* v. *Baltimore Steamboat Co.*, 19 Fed., 56; *Rubens* v. *Ludgate Hill S. S. Co.*, 20 N. Y. Supplement, 481; affirmed, 143 N. Y., 629; The *Southgate* [1893], Prob., 329; *Pollock on Bills of Lading*, 39.

The exception was obviously inserted for the purpose of exempting the ship from some liability to which, without such exception, she would be subject. Without such an exception the ship would be liable for unseaworthiness due to latent defects at the time of shipment. No other liability to which it may be presumed to apply can be suggested. It is evident from the language that the shipowner intended the exception to relieve him from that particular liability. Can the libelant reasonably pretend that she did not so understand the exception? She could not be heard to say she did not understand "latent defects" to include defects which existed at the time she received her contract, because she is presumed to understand the meaning of the words in their ordinary sense. It is impossible to conceive that two reasonable persons about to enter into a contract would insert a stipulation against latent defects, and mutually agree or understand, at the time, that it was only to apply to defects which might *become* latent in the future. Such a construction as Judge Shipman remarked, "savors of the distinctions of the schoolmen" (p. 213).

(**b**.) This exception, unlike that in the Caledonia, does not stand in a long enumeration of exceptions relating to matters subsequent to the beginning of the voyage, and hence does not fall within the second ground of the decision in that case.

The contract here (pp. 145, 146), was for delivery "in the like good order and will conditioned, at the aforesaid port of New York [subject to the enumerated exceptions

on page 146] unto J. W. Wuppermann, Esq." Between the words "at the aforesaid port of New York" and the words "unto J. W. Wuppermann," are two paragraphs of exceptions, some of which "relate to matters subsequent to the beginning of the voyage," but a large number of which relate to matters *prior to* breaking ground on the voyage. Amongst the latter are loss or damage from (1) fire on board in hulk or craft, or on shore (*Scott* v. *Balto. Stbt. Co.*, 19 Fed., 56); (2) latent defects in hull, tackle, boilers and machinery, or their appurtenances (The *Laertes*, 12 P. D., 187); (3) inaccurate description of goods shipped (The *Mississippi*, 76 Fed., 375); (4) insufficiency in packing or in strength of package (*Payne* v. *Ralli*, 74 Fed., 563); (5) inaccuracies of marks, numbers, designation or address on the packages. The question here is not one of putting a limitation on the general words, but of reading them in their ordinary sense (Lord Esher, M. R., in *Baerselman* v. *Bailey* [1895], 2 Q. B., 301, 304).

(**c**.) It is not denied in the *Caledonia* that the carrier may, by apt words, limit or modify the implied warranty of seaworthiness, or that such a clause introduced in the bill of lading relates back to and modifies the warranty as of the time of shipment.

The Court referred, with apparent approval, to the *Laertes* (*supra*), saying:

"The exceptions were held to limit the implied warranty of seaworthiness *in accordance with the expressed intention of the parties to that precise effect*, and for that reason only, take the case out of the general rule."

And, as if to save future cases, the Court added:

"*We are not dealing with the question of how far exceptions may be given effect in particular cases, but* whether by those under consideration claimants were exempted from liability for unseaworthiness, and we are clearly of opinion that they were not."

The real question here is: Does the exception amount to a precise expression of intention to limit the implied warranty? The claimant maintains that the words used taken

in their ordinary sense express precisely a mutual intention to relieve the shipowner from all damage that may be due to latent defects. If those defects amount to unseaworthiness, they are none the less an expressly excepted cause of damage; and hence it is to be presumed the parties must have meant it to modify the implied warranty if the defects should constitute unseaworthiness. The fact that a latent defect may constitute unseaworthiness does not make the exception ambiguous. Their primary intention as shown by their plain language was to except "latent defects", whatever they might amount to. A contrary holding, under a rule of construction against one of the parties, would impute to him an intent to remain liable for defects that were latent when he made his contract; *although in it he expressly stipulated then against any liability from such cause.*

There is no liability from which the Court ought to be more willing to permit a shipowner to obtain exemption than from that for latent defects (Brown, *J.*, in The *Rover*, 33 Fed., at p. 521). They exist wholly without his fault. The bare statement that a defect is latent shows that it has baffled and must baffle the exercise of due diligence and care. No liability for damages arising from latent defects could be established, except under the doctrine that the carrier is an insurer (The *Flowergate*, 31 Fed., 763; The *Concord*, 58 Fed., 913). This extraordinary liability has been taken away in some cases by statute as in Germany, where a latent defect is treated as *force majeur* (*Imperial Code of Commerce*, Sec. 607).

(2) In the accepted commercial understanding of the exemption of "latent defects", it amounts to a modification of the implied warranty of seaworthiness (*Pollock on Bills of Lading*, 39). The Court should, if possible, adopt the universal commercial construction.

The wording of the exception found in this bill of lading, of "*latent defects in hull, tackle, boilers and machinery, or their appurtenances,*" has been adopted and retained after prolonged discussion and deliberation in commercial bodies in which shippers, shipowners and underwriters on both ships and cargoes have taken part.

Discussion of the form of this and the negligence clause has extended over a period of more than thirty years. The history of the discussion, and the results reached, is given in *Wendt's Papers on Maritime Legislation* (3rd Ed.), Chapter II., entitled "*The International Law of Affreightment in Connection with the Attempts to Agree upon Uniformity in the Wording of Bills of Lading*" (pp. 295–513).

(**a**.) It appears that the agreement reached in regard to general average by the York Congress of 1864, led to attempts to come to some similar arrangement upon the subject of freight and contracts of affreightment.

The first step in this direction was a *projet* in regard to *freight* drawn up by two of the Belgian delegates to the International General Average Congresses (*Wendt*, p. 295). It was approved by an Executive Council of the National Association for the Promotion of Social Science, which met in Sheffield, October 5, 1865, under the presidency of Sir Robert I. Phillimore (*Wendt*, pp. 298, 308).

Changes in the terms and conditions of contracts of affreightment, found necessary by the different commercial conditions which followed the introduction of iron and steel vessels as instruments of commerce, were first considered in public deliberations after the opening of the Suez Canal, in July, 1871, at a meeting of merchants and others engaged in trade to the East, who agreed upon an Eastern Trade Bill of Lading (*Wendt*, p. 309). The form of this document is not preserved (*Wendt*, p. 345). The deliberations of this committee were not, however, of an international character.

(**b**.) Dr. Wendt observes (p. 309) that it was left to the *Association for the Reform and Codification of the Law of Nations* to resume, in 1879, the consideration of the international law of affreightment at the stage where it had been left by the Sheffield Congress in 1865. Three years were spent in correspondence and preparations for a meeting to deal with the subject, and in drafting the model bill of lading. The conference met at the Town Hall, in Liverpool, August 8, 1882, to debate the terms of the proposed document (Wendt., p. 356).

The committee which drafted the form of the bill of lading submitted to the Association for its action was composed of representatives of the following commercial interests: (1) The Ship Owners' Association (two members); (2) the Steamship Owners' Association (two members); (3) the Chamber of Commerce (two members); (4) the American Chamber of Commerce (two members); (5) the East India and China Section of the Chamber of Commerce—English (two members); (6) the Iron and General Metal Trade Section of the same chamber (two members); (7) Cotton Section of the same (two members); (8) the Underwriters' Association (two members); (9) the Liverpool Law Society (two members), who were asked to take part in order to advise the committee on points of law and to assist in the framing of clauses. There were in addition seven of the Central Association members on the committee, who took part *ex-officio* in the deliberations of the committee (Wendt, p. 359).

It will be observed that the cargo and underwriting interests had, on this committee, *fourteen* members; that the shipowners and steamship owners had but *four* members; that there were two members from the Law Society and seven members from the General Committee. Even if it be assumed that the two lawyers and the seven members of the General Committee all took part in the interest of the shipowners (a most improbable assumption), the committee which drafted the bill of lading submitted to the Conference would be composed of *fourteen* members representing cargo interests against *thirteen* representing shipowners' interests. Such a committee, presumably, would deal fairly with cargo interests, however strict they might be in excluding provisions favorable to the shipowners.

The draft bill of lading (*Wendt*, pp. 363, 366) was considered carefully by the full body of the Association, clause by clause (*Wendt*, pp. 366-379). The result of their deliberations was the adoption of the form of document, since known as the "*Liverpool Bill of Lading*, 1882" (*Wendt*, pp. 379-382; *Carver, Carriage by Sea*, 2d Ed., p. 761).

In the draft bill presented to this Conference the clause in regard to latent defects was expressed as follows (*Wendt*, p. 364):

"Ship not answerable for losses through explosion, "bursting of boilers, breakage of shafts, *or any latent de-* "*fect in the machinery or hull* not resulting from want of "due diligence by the owners of the ship, or any of them, "or by the ship's husband or manager."

This clause was, without doubt, introduced as a limitation upon the shipowners' obligations as defined in *Lyon* v. *Mells*, 5 East., 428; *Kopitoff* v. *Wilson*, 1 Q. B. D., 377, and *Steel* v. *State Line*, 3 App. Cas., 72, to the effect that under his implied warranty of seaworthiness, he is deemed to warrant not merely that he will do his best to make the ship reasonably fit, but that she *shall be* reasonably fit for the voyage (The *Gelfruin*, 10 Prob. Div., 103, 108).

It is noteworthy that, although the discussion upon this document was very full, and participated in by a large number of European delegates, not a word is reported to have been said against the justice of this particular exemption. It was adopted by the Conference in precisely the form in which it was submitted (*Wendt*, p. 380).

(**c**.) In 1883 the *New York Produce Exchange*, a body composed of merchants, shipowners and agents, average adjusters and bankers, appointed a committee to draft a bill of lading for steamships, to be used as a basis of outward bound contracts (*Wendt*, pp. 382, 395). The committee was composed of three merchants, two shipowners, a banker and an average adjuster (*Wendt*, p. 395). They agreed on a form based chiefly on that adopted in Liverpool at the conference of the *Association for the Reform and Codification of the Law of Nations* in 1882 (*Wendt*, 382). In their report they proposed to retain the clause in which occurs the exception for latent defects, but phrased as follows:

"Ship not answerable for * * * losses through ex- "plosion, bursting of boilers, breakage of shafts, or any "*latent defect* in hull or machinery, not resulting in either "case from want of due diligence by the owners of the

" ship, or any of them, or by the ship's husband or man-
" ager " (*Wendt*, p. 387, 395–397).

This bill, with slight modifications, was adopted by the Exchange October 24, 1884 (*Wendt*, p. 405). The clause in question was slightly modified so as to read as follows (*Idem*, p. 406):

" It is also mutually agreed that the carrier shall not be
" liable for loss or damage occasioned by * * * any
" latent defect in hull, machinery or appurtenances," the phrase " not resulting from due diligence, &c.," being omitted.

(**d.**) Meantime in England, in 1883, the *Australian and New Zealand Underwriters' Association*, consisting of eighteen separate insurance companies, and the *Combined London Marine Underwriters*, consisting of thirteen companies, sent protests to the secretary of the Association for the Reform and Codification of the Law of Nations against the form of the bill of lading adopted in 1882 (*Wendt*, pp. 398 to 402). These protests, however, were aimed exclusively at the negligence clause, and *no objection was made in either protest to the exemption against latent defects.*

(**e.**) The *New York Chamber of Commerce*, in a report of March 6, 1884, opposed the principle of the Liverpool and New York Produce Exchange bills of lading. They prepared an act to be introduced in Congress, making it unlawful to insert in contracts of carriage certain of the provisions which had been agreed upon in the Liverpool bill of lading, and were about to be adopted by the Produce Exchange; and this act seems to have passed the House of Representatives (*Wendt*, pp. 402, 405). Although by this proposed act it was made unlawful to insert any negligence exemption in a bill of lading, the effect of the third section was to permit the insertion of an exemption against latent defects. Section 3 (*Wendt*, p. 403) provided that:

" It shall not be lawful for any such vessel, her owners,
" master, agent, or manager to insert in any bill of lading
" any clause, covenant or agreement whereby the obliga-

" tions of the owners of said vessel to properly equip, man, " provision and outfit such vessel, *and in every way and* " *manner within their, his or her power to render said* " *vessel seaworthy* and capable of performing her intended " voyage, shall in any wise be lessened, weakened or " avoided."

This did not exclude an exception of latent defects.

(f.) As a result of the agitation in England by merchants and underwriters against the Liverpool form, the next meeting of the *Association for the Reform and Codification of the Law of Nations*, in Hamburg, August, 1885 (*Wendt*, p. 430), rescinded its action taken at the meeting at Liverpool, in 1882, and adopted a short form of bill of lading without exceptions; but provided that it should be subject to all the conditions of the Hamburg Rules of affreightment, which were also drawn up by the Association at the same time (*Wendt*, p. 472). These were based chiefly on a series of rules proposed by the Hamburg Chamber of Commerce (*Wendt*, pp. 435, 438).

The rule as to latent defects proposed by the Hamburg Chamber of Commerce (*Rule* 2; *Wendt*, p. 436), read as follows:

" Owners to be exempt from any latent defect in hull or " machinery (*not resulting in either case from unseaworth-* " *iness*, or from any want of due diligence by the owner of " the ship or by the ship's husband or manager)."

This rule, as modified by the society before adoption (*Rule* 2; *Wendt*, 472), read:

" The shipowner shall not be responsible for loss or " damages arising from *vis major*, public enemies, civil " commotions, pirates, robbers, fire, explosion, bursting " of boilers, breakage of shafts or screws, nor any *latent* " *defect* in hull or machinery not resulting from want of " due diligence by the owner, husband, or manager of the " ship."

The words, "*not resulting from unseaworthiness*" in the proposed rule was *omitted* from the rule as adopted.

(**g**.) The thread of this discussion was next resumed by a congress assembled at Antwerp in September and October, 1885, under order of the Belgian Government (*Wendt*, p. 476). This congress, amongst its conclusions, stated:

"It is, however, lawful for the parties to vary this "[shipowners'] responsibility by special stipulations, with "the following exceptions: Owners of the ships should "be prohibited from relieving themselves, in advance, of "their responsibility by inserting a clause in the contract "of affreightment, the bill of lading, or any other agree- "ment (a) for any *acts of their captains or officers* tend- "ing to compromise the seaworthiness of the ships."

It is plain that this was not designed to prevent an exception from latent defects in the hull or machinery of the vessel; these would not, in the nature of things, result from any act of the captain or officers.

(**h**.) At a meeting of the *Baltic Exchange*, London, July 25, 1885, a bill of lading was adopted for use in trade with the Black Sea, Mediterranean and Baltic (*Wendt*, pp. 428, 429). This document contained the following clause:

"Strandings, collisions, &c., are also excepted even when "occasioned by negligence, * * * but nothing herein "contained shall exempt the shipowner from liability to "pay for damage to cargo occasioned by bad stowage, by "improper or insufficient dunnage or ventilation, or by im- "proper opening of valves, sluices and ports, or by causes "other than those above excepted, and all the above excep- "tions are conditional on the vessel being seaworthy "when she sails on the voyage, *but any latent defects "in the machinery shall not be considered unseaworthi- "ness* provided the same do not result from want of due "diligence of the owners, or any of them, or by the ship's "husband or manager."

In the form of the charter party for that trade the exception was extended so as to include latent defects in *hull* or machinery, or their appurtenances. These documents were before *Brown, J.*, in the case of the *Sanfield*, 79 Fed., 371, where he absolved a vessel from damage claimed to have been due to a latent defect.

(**i**.) In December, 1885, a subcommittee of the *London Chamber of Commerce* (*Wendt*, p. 478) drafted an act, designed to be introduced in Parliament, which was entitled, "*An Act to regulate and define the duties and liabilities of shipowners*" (*Wendt*, pp. 478-485). Section 6 of this proposed act provided:

"Any provision or exception in the bill of lading or in "the agreement purporting to relieve or exonerate in any "way any shipowner from any duty to properly equip, "man, provision and fit out any ship, and to render it "seaworthy, or for any implied warranty of seaworthi-"ness in a contract of affreightment shall be null and "void;"

But it contained a proviso that

"*No shipowner shall be liable for injury, damage, or "loss as aforesaid caused by or arising from any latent "defects in the hull, machinery*, tackle, equipment, or "outfit of a ship, which could not have been discovered "by reasonable care or skill *on the part of the shipowner, "master, crew, servant or agent.*"

That this committee, representing cargo interests chiefly, voluntarily inserted the proviso concerning latent defects, is a concession of the reasonableness of the exemption. Their report was adopted and confirmed by the general committee of the London Chamber of Commerce, April 5, 1886, but was not followed by any action of that body (*Wendt*, p. 486).

(**j**.) In the month of May, 1886, the *Chambers of Commerce of Hamburg and Bremen*, as well as the associations of shipowners at those ports, agreed upon the adoption of a uniform bill of lading for steamships, and issued a statement respecting its introduction (*Wendt*, pp. 487, 490). That document contained an exception of "any latent defect in hull or machinery, not caused by unseaworthiness or want of due diligence by the owner or 'ship's husband.'"

(**k**.) Action was next taken on this subject in England at the meeting of the *Association for the Reform and Codification of the Law of Nations*, which met in London

July 25, 1887, under the presidency of Sir Charles Parker Butt, one of the Judges of the Admiralty Division (*Wendt.*, p. 493). The form of bills of lading was there fully discussed again by the representatives of different nations, including our own. Dr. Sieveking, president of the Hanseatic Court of Appeal at Hamburg, presiding during most of the discussion (*Wendt*, p. 496). The result of the deliberations was that the association receded from its action taken in Hamburg in 1885, passing the motion of Mr. Gray Hill, of Liverpool, to return to the bill of lading adopted by its conference in Liverpool in 1882, which was again accepted as a reasonable and fair document (*Wendt*, pp. 497, 506).

(**1.**) It is not reasonably to be doubted that, in all of these cases, the committees of shipowners, merchants and underwriters, who drew up and agreed upon the foregoing forms of bills of lading, understood and intended that the exception of latent defects should exclude all liability on the part of the shipowner for latent defects which existed at the time of shipment. The purpose of the exception is so universally known and recognized, that any other interpretation of it would be a departure from the usual commercial construction.

(**3.**) It is plain that the second section of the Harter Act (*Appendix*, p. 87), does not prohibit the introduction of an exception of latent defects in the hull existing at the time of shipment.

That section merely prohibits the introduction of any clause whereby the obligation of the owner *to exercise due diligence to make the ship seaworthy* shall be lessened, weakened or avoided. The third section provides that if the owner shall exercise due diligence to make the ship seaworthy and have her properly manned, outfitted and equipped, he shall not be liable for faults or errors in navigation, or in the management of the vessel, or for damages arising from dangers of the seas, &c. It was the obvious purpose of the second section merely to prohibit the introduction in bills of lading of clauses incompatible with the exercise of that measure of diligence in providing a seaworthy ship which is called for by the

third section. An exception from liability for latent defects existing at the time of shipment, by its terms covers only such defects as are not discoverable by the exercise of due diligence, and hence is not obnoxious to the second section, even though that section be deemed to apply to contracts made abroad and valid where made, a matter not necessary to be determined in this case.

(4.) The appellant is not in privity with the express warranty of seaworthiness in the charty-party between James Knott, owner, and George Christall, charterer of the vessel.

A year prior to this voyage the claimant had chartered the *Carib Prince* to George Christall, of the Trinidad Direct Line Steamship Company, for the period of four years (p. 148). The steamer was engaged under that charter at the time of the accident. It vested the entire possession and control in Christall, who operated her with his own servants and at his own expense. It was a demise charter (*Scrutton on Charter Parties*, pp. 1-3; *Baumvoll* v. *Gilchrist*, 1892, 1 Q. B. D., 258; *Baumvoll* v. *Furness*, 1893, App. Cases, 8; *Meiklereid* v. *West*, 1 Q. B. D., 428; *U. S.* v. *Shea*, 152 U. S., 178; *Freed* v. *U. S.*, 11 Wall., 591; *Hooe* v. *Groverman*, 1 Cranch, 214; *Marcardier* v. *Insurance Co.*, 8 Cranch, 39; *Bramble* v. *Culmer*, 78 Fed. Rep. 497).

Notwithstanding such a demise of the vessel, it has been held that she is liable *in rem* for the breach of a contract of carriage made for her by the charterer (*Schr. Freeman* vs. *Buckingham*, 18 How., 182).

Libelant's bill of lading was issued by Christall (fol. 434). She declared on this contract in her libel (fol. 5), apparently on the theory that it bound the ship *in rem*, though signed by the charterer (The *Centurion*, 57 Fed., 412, 416). No reference was made in her pleading to an express warranty of seaworthiness contained in a charter between other persons. Any such allegation would have been impertinent. Her rights, and the steamer's obligations to her, are to be determined from the bill of lading (*Iron Mountain Ry* v. *Knight*, 122 U. S., 79, 92; *N. J. St. Nav. Co.* v. *Merchants' Bank*, 6 Howard, 344).

She is not in privity with the charter or any of its stipulations; nor is she in position to claim any greater rights as against the steamer than she had as against the charterer with whom she contracted, on the terms, conditions and exceptions stated in the bill of lading.

It is alleged that the merchandise in question was libelant's property at the time of shipment (fol. 5). If this be true, the shipper was her agent for the purpose of shipment and to make the contract. It is presumed he had authority to make it in the form adopted (*Zimmer* v. *N. J. Central Ry.*, 137 N. Y., 460, 463; *Jennings* v. *Grand Trunk Ry.*, 127 N. Y., 438, 446); but no question can arise on this point, since the libelant adopted the contract and declared on it in her libel (fol. 5).

Moreover, this charter-party is not before the Court except for a qualified purpose. The libelant had examined as witnesses Ernest C. Legge, master, and Edward Keeys, engineer, and certain entries of the engineer's log book had been put in evidence by the libelant (p. 43). The claimant thereupon to show that these entries were not binding on them proved that the officers and engineers of the ship were not servants of the shipowner (p. 86), and offered in evidence the charter-party, "for the purpose of showing that it is only a charter of the bare ship and that all of the members of the crew and officers are servants of the charterer, not of the shipowner" (fol. 257). It was not introduced by the claimant for the purpose of varying, in any way, the contract between the libelant and the ship, as agreed in the terms of the bill of lading (p. 145). The bill of lading made no reference whatever to the charter-party.

VI.

The Bearing of the Harter Act.

The consideration of the statute of February 13, 1893, familiarly known as the "Harter Act" (2 Supp. R. S., p. 81; *Appendix*, pp. 87–89), is more especially involved in the case of the *Silvia*, No. 79, which follows this

case on the calendar. It will be unnecessary to resort to it here unless the Court holds that the loss is not within any of the exceptions contained in the bill of lading. In that contingency the claimant would desire to invoke the protection afforded by the third section of the statute, assuming that, like the former acts relating to navigation, it is applicable to foreign vessels (The *Etona*, 64 Fed., 880, 882; 38 U. S. App., 50; The *Silvia*, 35 U S. App., 395; The *Strathairley*, 124 U. S., 555; The *Scotland*, 105 U. S., 24, 30; The *State of Virginia*, 60 Fed., 1018; *Thomassen* v. *Whitwell*, 12 Fed., 891; *In re Leonard*, 14 Fed., 53; *Levinson* v. *Oceanic Steam Nav. Co.*, 15 Fed. Cas., 442). The third section provides:

"That if the owner of any vessel, transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agents or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel," &c.

(1.) The owner of the vessel exercised due diligence to make her in all respects seaworthy and properly equipped and supplied, within the meaning of the statute.

The evidence of diligence and care used in the construction and testing of the vessel has been referred to in another connection (*ante*, p. 50–52). It shows, in effect, that no pains nor expense was spared in providing a seaworthy vessel, and that the owner was justified, as both the lower Courts have found, in believing her to be seaworthy. She was a more expensive vessel than others of her class; she was constructed to possess greater strength than was called for by the requirements of Lloyds' Rules, and the bulkhead in question withstood tests in excess of those so required. The general competency of her officers appears. It is not questioned.

It is not shown that any usual or customary precaution for preserving and maintaining the sound condition of the vessel was neglected. The presumption of fact would be that she was still fit (*Pickup* v. *Ins. Co.*, 3 *Q.*

B. D., 594; *Lunt* v. *Ins. Co.*, 19 *Blatchf.*, 151, 155; The *Warren Adams*, 74 Fed., 413, 415; The *Rover*, 33 Fed., 515, 520).

The only suggestion of any default is found in the argument of counsel that the tank should have been filled with water in Trinidad. That suggestion has been dealt with in another connection (*ante*, pp. 43–47), where we have endeavored to show (*a*) that there was no proved usage to adopt such precaution; (*b*) that it is to be presumed, in the absence of other proof, that the examination of the bulkhead, made by the engineer in Trinidad was of the usual character; (*c*) that such examination was carefully made, and would probably have discovered the fact if the bulkhead had really been strained at that time (The *Warren Adams*, 74 Fed., 413, 416) and (*d*) that the uncertainty as to whether the water test would have disclosed anything is such that the failure to adopt it cannot constitute a want of due care or diligence.

The conclusion from the evidence is not only that the owner used due diligence by providing a proper ship, with all needful appliances, and competent officers and men to manage them (The *Silvia*, 64 Fed., 607), but also that those officers and men used that degree of diligence which the statute calls "due," in their effort to have the ship actually seaworthy for the voyage. Possibly the *highest* diligence would have insured seaworthiness; but even that is not certain. The statute, however, calls for ordinary diligence only; not for the highest diligence.

Due diligence means nothing more than that degree of carefulness and attentiveness which men in general exert in respect to their own affairs; that common prudence which men of business and heads of families usually exhibit in conducting that which interests them. The diligence actually exercised was of this grade.

(**2.**) The damage was within the exemption of "faults or errors in navigation *or* in the *management*" of the vessel.

(**a.**) It has been argued (*ante*, p. 16 *et seq.*) that the proximate cause of the damage was the *negligent filling*

of the tank at sea. If the Court adopts that conclusion, it seems plain that the careless act, if not strictly of navigation, was a fault in the *management* of the vessel (The *Silvia*, 64 Fed., 607; 35 U. S. App , 395; The *Sandfield*, 79 Fed., 371; The *Mexican Prince*, 82 Fed. 484; *Botany Worsted Mills* v. *Knott*, 76 Fed., 582, 584; The *Colima*, 82 Fed., 665, 680; The *Glenochil* [1896], Prob , 10, 15, 16, 18, 19; *Carmichael* v. *Liverpool*, &c., 19 Q. B. D., 242; *Good* v. *London*, &c., L. R., 6 C. P., 563; The *Warkworth*, 9 P. D., 20; 9 P. D., 145; *Hedley* v. *Pinkney & Sons Co.* [1894], App. Cas., 222).

If it be considered that the damage was due to a combination of two causes, namely, a latent defect in the rivet existing at the time of shipment, and the negligent filling of the tank, the ship is nevertheless exempted. The existence of the latent defect was not owing to any want of due diligence by the owner, and hence was not a matter which imposes any liability upon him where the *immediate* cause of the loss is a fault in navigation or management.

Under the cases above cited, and on the uncontradicted evidence of the only witnesses examined on that subject (Congdon, pp. 133, 135; Martin, p. 91; Saunders, p. 86), filling the tank at the time and in the way it was filled was a fault in management. It would be none the less a fault in management though the Court should be of opinion that the water test should have been applied in Trinidad. The argument that such a test was called for is predicated on the assumption that the master, as a reasonably prudent man, should have thought of the liability of injury to the bulkhead in the recent previous storm. The same reasoning leads to the conclusion that, having neglected to make such a test, he should not have used the tank on the voyage, and that hence his act in using it then constituted a mismanagement, which, rather than the failure to test it with water previously, was the proximate cause of the loss. There was no necessity of his using it; he ought to have used the tank under the floor, which was empty, instead of the peak tank. This is almost a matter of common

knowledge in regard to navigation, and is conceded in the supplemental brief for the appellant (p 4).

There was no water in the peak tank when the ship left Trinidad, and, so far as appears from the evidence, there was no thought then of filling it during the voyage. It had not been filled during any previous voyage (pp. 22, 23). The ship was perfectly seaworthy to start in the condition in which she was, without water in the tank, and hence the rule stated in *Arnauld on Insurance*, Vol. 2, p. 640, may be invoked:

"It is enough to satisfy this warranty" (of unseaworthiness) "if the ship be originally seaworthy for the voyage insured when she sails on it. There is no implied warranty that the ship shall continue seaworthy in the course of it. 'Every ship,' says Lord Mansfield, 'must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage.'"

It was an act of management of the ship during the voyage that made the latent defect a source of peril to the cargo. If the tank should not have been managed in that way without having applied a water test to it before sailing, the act became one of mismanagement, or a fault in the management, and is thus within the protection of the statute.

Plainly it would have been a fault in management to have filled the tank, if the master had known that one of the rivets was out and that water would spurt in on the cargo through a rivet hole. If, though he knew of no defect in it, yet in view of the storm of the previous voyage, he was not justified in treating the tank as sound without having tested it with water before sailing, his act in putting the sea against it was of the same quality.

(**b.**) If the failure to apply the water test before sailing was a fault, it was a fault of the master in the management of the ship, and not a want of due diligence in the *owner* (*Massey* v. *Morris* [1894], 2 Q. B., 412; The *Warkworth*, 9 P. D., 20; do., 145).

It is not strictly material whether the fault in management has or has not left the ship unseaworthy, since by

the statute a warranty of due diligence by the owner has been substituted for the former absolute warranty of seaworthiness. This has been decided in a number of cases: thus, in the *Colima*, 82 Fed., 665, 678, Brown, *J.*, held:

"The context and the pre-existing law indicate that the intent of the act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact, and to substitute for that warranty a warranty only of [due] diligence to make the ship seaworthy."

(**c.**) The diligence referred to in the statute is the owner's *personal* diligence, not that of servants.

The third section of the act was plainly a provision for the limitation of the pre-existing liability of shipowners. (The *Delaware*, 161 U. S., 459, 471; the *Silvia*, 64 Fed., 607, 608, Brown, *J.*; 35 U. S. App., 395, Wallace, *J.*; the *Colima*, 82 Fed., 665, 678, Brown, *J.*). It should therefore be construed as *in pari materia* with the prior limitation statutes (R. S., Secs. 4282-3-4-5, 282-3-4-5; Act of June 26, 1884, *In re Meyer*, 74 Fed., 381). By those statutes the liability of the owner was limited, in the cases specified, where the loss had not occurred from his "design or neglect" or "privity or knowledge." The decisions under them hold, that the design, neglect, knowledge or privity that excludes their operation must be *actual*, and not merely constructive or imputed; that is, actual through the owner's knowledge, or authorization, or immediate control of the wrongful acts, or conditions, or through some kind of personal participation in them (*Walker* v. *Transportation Company*, 3 Wall, 150, 153; *Craig* v. *Insurance Company*, 141 U. S., 638, 646, 647; *Hill Manufacturing Company* v. *Providence & N. Y. S. S. Co.*, 113 Mass., 495, 499, 500; s. c., 109 U. S., 578; *Quinlan* v. *Pew*, 56 Fed., 111, 113, Nelson, *J.*; opinion of Court of Appeals, *do.*, pp. 116, 117; the *Republic*, 61 Fed., 109, 112, 113; *Butler* v. *Boston, &c., S. S. Co.*, 130 U. S., 527; the *Warkworth*, 9 P. D., 20; *do.*, 145; the *Spirit of the Ocean*, 34 *Law Journal*, Admiralty, 74; the *Great Western*, 118 U. S., 520, 525; *Massey* v. *Morris* (1894), 2 Q. B., 412).

When Congress made the exercise of due diligence by the *owner* to make the ship seaworthy the condition of the ship's exemption from certain causes of damage stated in the third section of the Act of 1893, the presumption is that it intended the exemptions to apply whenever he had been *personally diligent* in the degree required, and that the defaults of the servants whom he employed to manage the vessels appliances should not be imputed to him so as to deprive him of the benefits of the section. The sense of the section is the same as though it provided like the former statutes, that the ship and owner shall be exempted in the cases stated if the losses occur without the design, neglect, privity or knowledge of the owner. If under the earlier acts the neglect or default of servants is not to be imputed to the owner so as to make their design, neglect, knowledge or privity his, no reason is perceived why the failure of competent servants of the shipowner to exercise due diligence to make the ship seaworthy, when beyond his immediate supervision and in their exclusive control, should be imputed to the "owner" under this statute. Such a construction, in effect, makes the statute read, "if due diligence *has been exercised* to make the ship seaworthy," when, in fact, it reads, "if the *owner* shall have exercised due diligence."

(**3**.) The act operates in effect as an exemption from latent defects, by substituting as the measure of the shipowner's duty, with regard to seaworthiness, a warranty of diligence to make the ship seaworthy, instead of an insurance to that effect.

(**a**,) The third section of the statute providing that if the owner of the vessel *has exercised due diligence to make her seaworthy*, he shall not be liable for faults or errors in navigation, &c., construed in connection with the second section, which prohibits the introduction of clauses modifying the obligation of the owner *to use due diligence to make the vessel seaworthy*, indicates that Congress intended, by this statute to abrogate entirely, the former absolute warranty of seaworthiness, and to substitute, in its place, the warranty of due diligence by the owner. This has already been held in a number of cases, where the loss

fell specifically and clearly within the causes of damage expressly excepted in the third section of the statute (The *Silvia*, 64 Fed , 607, 608; 35 U. S. App., 395; The *Sandfield*, 74 Fed., 371; The *Mexican Prince*, 82 Fed., 484, 488, 489; The *Colima*, 82 Fed., 665, 678). In the last case Brown, *J.*, said:

"The context and the pre existing law indicate that the intent of the act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact, and to substitute for that warranty a warranty only of [due] diligence to make the ship seaworthy."

And in one of his earlier decisions under the statute, (The *Millie R. Bohannan*, 64 Fed., 883), Judge Brown, dealing with the scope and evident purpose of the statute, said:

"*The design of the Harter Act was, I have no doubt, to relieve the carrying vessel from her previous responsibility, as insurer against latent defects*, and to limit her liability as respects seaworthiness, to the obligations of due diligence to make the ship seaworthy."

It was evidently the purpose of the statute to do away with the absolute warranty in all cases.

This conclusion flows from the very language of the act. In the second section, "*the obligations of the owner or owners of said vessel to exercise due diligence*, (to) properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage," are those which he is prohibited from lessening by contract. The statutory statement of the nature of those obligations amounts, practically, to a definition of them, and implies that from the date of the passage of the statute such definition shall be taken as the measure of those obligations. This implication is re enforced by the language of the third section, which provides a statutory exemption in a large number of cases, provided the owner shall have exercised due diligence to make the ship seaworthy, &c., which is stated to be the measure of his obligation in the prior section.

The embodiment in the statute of certain express exemptions from liability does not impliedly exclude other

exemptions by contract. Certain classes of exemptions, not included in the third section, are expressly excluded by the first section. This, of itself, shows that no others are intended to be excluded. The whole field of exemptions, between those excluded in the first section and those expressly provided in the third section, are left to be dealt with by contract

(**b.**) The operation of contract exemptions and of the statutory exemptions, should not depend upon different conditions. It would be quite anomalous to hold that the contract exceptions could only operate where the ship was absolutely seaworthy on sailing, but that the statutory exemptions might apply though the ship was not seaworthy in fact, provided the owner had used due diligence to make her seaworthy. The conditions on which the right to exemption depends, should be alike in all cases. It was apparently the design of the second section of the statute to accomplish this, by defining the shipowners' general obligation as to seaworthiness to be the same as that which the third section requires them to fulfill as a condition of enjoying the exemptions from liability therein provided.

(**c.**) The Court is not bound to construe this statute grudgingly and strictly, as in derogation of the common law. On the contrary, as a part of the law limiting the liability of shipowners, it should, like other similar acts, receive a liberal construction.

Section 4282 of the Revised Statutes, providing an exemption from liability for fire damage occurring without the shipowner's design or neglect, was in derogation of the common law. Prior to that statute carriers were insurers against fire, yet this Court very early adopted the liberal construction that the words "design or neglect" contained in the statute, meant the owner's personal design or neglect, and that he was not deprived of its benefits by the design or neglect of his servants (*Walker* v. *Transportation Co.*, 3 Wall., 150; *Moore* v. *Transportation Co.*, 24 How., 1).

Since those decisions it has been repeatedly announced in this Court that all of the sections relating to limitation of liability (4282–4285, R. S.), including the fire section, should be construed liberally and ungrudgingly.

(**a.**) The construction proposed would not be opposed to the public interest. The question of insurance is really not a practical one (The *Main*, 152 U. S., 122, 123). Competition exists in the business of insurance, as in all other branches of trade. The courts repeatedly have before them causes prosecuted in the name or in the interest of the insurers on cargo, who have paid losses in very plain cases of unseaworthiness, where they were under no legal liability (*e. g.*, the *Centennial*, 7 Fed., 601). The custom to insure is almost universal, and the business of insurance readily adjusts itself to the requirements of commerce. A great majority of the admiralty causes, if not in form, at least in substance and effect, are merely controversies between the different classes of underwriters. The public has no particular interest in having the losses fixed upon ship underwriters rather than on the insurers of cargo.

VII.

The decree of the Court of Appeals should be affirmed, with costs.

New York, March 4, 1898.

Convers & Kirlin,
Proctors for Claimant-Appellee.

J. Parker Kirlin,
Advocate.

APPENDIX.

HARTER ACT.

(NOTE.—Italics indicate parts changed by amendments in the passage of the bill.)

H. R. 9176.

A BILL relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted, etc., That it shall not be lawful for *any common carrier* or the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and* any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and

[PUBLIC—No. 57.]

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence* [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly

properly deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between* ports in the United States of America *and foreign ports* shall, *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery*, nor shall the owner or owners, *the vessel*, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, commercial carrier, or*

deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel nor shall the *vessel*, her owner or owners, charterers, *agent*, or master be held liable for losses arising from dangers of the sea *or other navigable waters*, acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be*

other person representing such vessel, has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section 1 or section 2 of this act, or if he is informed and is satisfied that the owner, agent, master, or other person representing such vessel, will not issue bills of lading, as required by section 4 of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents have been previously issued, until they are modified to conform to the requirements of said sections.

liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal Sections 4281, 4282, and 4283 of the Revised Statutes of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, *or any other statute defining the liability of vessels, their owners, or representatives.*

SEC. 7. That this act shall take effect from and after the 1st day of *September, 1892.*

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of *July*, eighteen hundred and *ninety-three.*

(Passed the House, amended to read as above, December 16, 1892. 24 Cong. Rec., pp. 147–149, 169.)

Passed the Senate as amended February, 1893, 24 Cong. Rec., 1275. Senate amendments concurred in February 8th, 1893. 24 Cong. Rec., 1342.

Approved, February 13, 1893.

[2 Supp. R. S., p. 81.]

THE CARIB PRINCE.[1]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 45. Argued March 7, 8, 1898. — Decided May 23, 1898.

Under the settled doctrine of this court, that the concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous, this court accepts as indisputable the finding that the Carib Prince was unseaworthy at the time of the commencement of the voyage in question in this case, by reason of the defect in the tank referred to in its opinion.

The condition of unseaworthiness so found to exist was not within the exceptions contained in the bill of lading, and, under the other facts disclosed by the record, the ship owner was liable for the damages caused by the unseaworthy condition of his ship; and there is nothing in the act of February 19, 1893, c. 105, 27 Stat. 445, commonly known as the Harter act, which relieved him from that liability.

The provision in that act exempting owners or charterers from loss resulting from "faults or errors in navigation or in the management of the vessel," and from certain other designated causes, in no way implies that because the owner is thus exempted when he has been duly diligent, the law has thereby also relieved him from the duty of furnishing a seaworthy vessel.

THE Carib Prince, an iron and steel steamer, was built in England in the spring of 1893, for the carriage of passengers

[1] The docket title of this case is "*Josephine W. Wupperman* v. *The Steamship Carib Prince, her engines &c., Ernest Legge, Claimant.*"

and freight. She was fitted with a peak tank, triangular in shape, extending from the bottom of the ship to the between decks, the tank being intended to hold water to be used as ballast in trimming the ship. The sides of the tank were the sides of the ship; the after end of it was the collision bulkheads. It was twenty-four feet deep, and had a capacity of eighty-three tons of water. The angle irons, beams, strengthening bars, etc., which enabled the collision bulkhead to sustain the strain of the water against it, were on the inside of the tank, the face of the bulkhead showing in the No. 1 hold being smooth, except that the plates were lap-jointed. The strengthening bars were fastened to the bulkhead by a series of horizontal rivets, the heads of the rivets, inside No. 1 hold, being situated three or more feet above the floor of the hold.

On September 14, 1892, the Carib Prince was chartered to the Trinidad Direct Line Steamship Company for the period of four years. On August 31, 1893, while the vessel was in the possession of the charterers, and lying in the port of Trinidad, loading for a voyage to New York, a number of cases of bitters were delivered on board, consigned to J. W. Wupperman. They were placed in the No. 1 hold. The bill of lading delivered to the consignor contained the following exceptions:

"The act of God, the Queen's enemies, pirates, robbers, restraints of princes, rulers and people, loss or damage from heat or fire on board, in hulk or craft or on shore, explosion, steam, accidents to or latent defects in hull, tackle, boilers and machinery, or their appurtenances, jettison, barratry, any act, neglect or default whatsoever, of pilots, masters or crew in the management or navigation of the ship, quarantine, collision, stranding and all and every other dangers and accidents of the seas, rivers or steam navigation, of whatever nature or kind, always excepted."

The ship left Trinidad on August 31, 1893, stopped for a short time at Grenada, just north of the Island of Trinidad, and from the latter port proceeded direct to New York. After leaving Grenada, and on the night of the 3d of September, by direction of the captain, the peak ballast tank referred to, and which adjoined the compartment in which the cases of bitters

Counsel for Parties.

were stored, was filled with sea water. This was done for the purpose of trimming the ship, which was several feet lower at the stern than she was forward. The next morning, or the second morning after, it was discovered that the water from the peak tank was escaping through a rivet hole into the No. 1 hold, the head of one of the rivets having been forced off. To recover the damage occasioned to the goods in question by the water which had thus gotten into the No. 1 hold, Mrs. Wupperman filed her libel in the United States District Court for the Eastern District of New York. Ernest Legge, master, on behalf of the owner, appeared and filed an answer, in which, after denying the material allegations of the complaint, the exceptions contained in the bill of lading were pleaded as a defence, and it was averred that said exceptions were valid in the port where the bills of lading were issued. It was also averred "that the owner and charterer used all due diligence to have her (the vessel) properly equipped, manned, provisioned and outfitted, and in every way seaworthy and capable of performing her intended voyage, and used all due diligence in and about the transportation of the merchandise in question, and alleged that if the cargo mentioned in the libel was damaged as alleged, the damage was due to latent defects in certain rivets, angle irons, braces and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage, as will more fully appear on the trial of this cause."

The case was tried in June, 1894, and a final decree was entered in October following, dismissing the libel. 53 Fed. Rep. 266. From that decree an appeal was taken to the Circuit Court of Appeals for the Second Circuit, which affirmed the decree of the District Court. 35 U. S. App. 390. A writ of certiorari being allowed, the cause was brought here for review.

Mr. Harrington Putnam for appellant.

Mr. J. Parker Kirlin for appellee. *Mr. Everett P. Wheeler* filed a brief for appellee.

Opinion of the Court.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

It was averred, in the answer, that the damage to the property of the libellant "was due to latent defects in certain rivets, angle irons, braces and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage." The District Court and the Circuit Court of Appeals held that the sole cause of the accident was a latent defect in a rivet from which the head had come off, leaving the hole through which the water poured in and upon the merchandise of the libellant. This defective condition of the rivet was found to have been caused by the fact that the quality of iron had been injured during the construction of the vessel by too much hammering, so that it became brittle and weak, rendering it unfit to sustain the reasonable pressure caused by filling the tank with water while at sea, and consequently causing the vessel to be unseaworthy at the time the bills of lading were issued and the goods were received on board. The settled doctrine of this court is that the concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous. *Compania La Flecha* v. *Brauer*, 168 U. S. 104, and cases there cited; *Stuart* v. *Hayden*, 169 U. S. 1; *Baker* v. *Cummings*, 169 U. S. 189, 198. As, after a careful examination of the evidence, we conclude that it does not clearly appear that the lower courts erred in their conclusion of fact, we accept as indisputable the finding that the Carib Prince was unseaworthy at the time of the commencement of the voyage in question, by reason of the defect in the tank above referred to.

Upon this premise of fact, the first question which arises for solution is this: Did the exceptions in the bill of lading exempting the ship owner "from loss or damage from . . . accidents to or latent defects in hull, tackle, boilers and machinery or their appurtenances," operate to relieve him from damages caused by the state of unseaworthiness existing at

the inception of the voyage and at the time the bill of lading was signed? This question is no longer open, as it is fully answered in the negative by the decision in *The Caledonia*, 157 U. S. 124. In that case the damage sought to be recovered had been caused by the breaking of the shaft of the steamer by reason of a latent defect which existed at the commencement of the voyage. The exemption from liability, which was there asserted to exist, was predicated on a provision in the bill of lading, relieving the owner from "loss or damage . . . from delays, steam boilers and machinery or defects therein." It was held that the clause in question operated prospectively only and did not relate to a condition of unseaworthiness existing at the commencement of the voyage, and that it must be construed as contemplating only a state of unseaworthiness arising during the voyage. The principle upon which the ruling rested was that clauses exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and were not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage. The rule thus announced in *The Caledonia* but expressed the doctrine stated by Lord Selborne in *Steel* v. *State Line Steamship Co.*, L. R. 3 App. Cas. 72, that the exceptions in a bill of lading ought, if in reason it be possible to do so, to receive "a construction not nullifying and destroying the implied obligation of the ship owner to provide a ship proper for the performance of the duty which he has undertaken." The fact that the exempting clause in the present case refers to latent defects, whilst that passed on in *The Caledonia* embraced defects generally, does not take this case out of the control of the general rule laid down in *The Caledonia*. The decision in *The Caledonia* was based, not on the particular character of the defects there referred to, but on the general ground that, unless there were express words to the contrary, the language of the exempting clause would not be held to apply to defects, whether patent or latent, existing when the voyage was commenced. In other words, that where the owner desires the

exemption to cover a condition of unseaworthiness existing at the commencement of the voyage, he must unequivocally so contract. An illustration of such contract was found in *The Laertes*, 12 Prob. Div. 187, referred to in the opinion in *The Caledonia*. In that case the bill of lading stipulated, not merely against latent defects, but against all such defects existing at the time of the shipment.

The condition of unseaworthiness found to exist not being then within the exceptions contained in the bill of lading, it remains only to consider whether under the facts disclosed by the record, aside from the exceptions in the bill of lading, the ship owner was liable for the damages caused by the unseaworthy condition of the ship. The contention is that, as the owner exercised due diligence to make the ship seaworthy, he was consequently not liable, because, under the present state of the law, a ship owner is no longer under the obligation to furnish a seaworthy ship, but only to exercise due diligence to do so. The radical change in the duties and obligations of ship owners which this proposition involves is asserted to arise from the statute of February 13, 1893, c. 105, 27 Stat. 445, commonly described as the Harter Act. The proposition rests on the assumed meaning of the second and third sections of that act. The second section is as follows:

"SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between the ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in anywise be lessened, weakened or avoided."

Now, it is patent that the foregoing provisions deal not with the general duty of the owner to furnish a seaworthy ship, but solely with his power to exempt himself from so doing by

contract, when the particular conditions exacted by the statute obtain. Because the owner may, when he has used due diligence to furnish a seaworthy ship, contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to so exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to the duty of using due diligence. To make it unlawful to insert in a contract a provision exempting from seaworthiness where due diligence has not been used, cannot by any sound rule of construction be treated as implying that where due diligence has been used, and there is no contract exempting the owner, his obligation to furnish a seaworthy vessel has ceased to exist. The fallacy of the construction relied on consists in assuming that because the statute has forbidden the ship owner from contracting against the duty to furnish a seaworthy ship unless he has been diligent, that thereby the statute has declared that without contract no obligation to furnish a seaworthy ship obtains in the event due diligence has been used. And the same fallacy is involved in the contention that this construction is supported by the third section of the act. The third section is as follows:

"SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The exemption of the owners or charterers from loss result-

ing from "faults or errors in navigation or in the management of the vessel," and for certain other designated causes, in no way implies that because the owner is thus exempted when he has been duly diligent that thereby the law has also relieved him from the duty of furnishing a seaworthy vessel. The immunity from risks of a described character, when due diligence has been used, cannot be so extended as to cause the statute to say that the owner when he has been duly diligent is not only exempted in accordance with the tenor of the statute from the limited and designated risks which are named therein, but is also relieved, as respects every claim of every other description, from the duty of furnishing a seaworthy ship. These considerations dispose of all the questions arising on the record.

The decrees rendered both in the Circuit Court of Appeals and in the District Court must be reversed, and the case be remanded to the District Court for further proceedings in conformity with this opinion. And it is so ordered.

Mr. Justice Brown, with whom concurred Mr. Justice Brewer, dissenting.

For the reasons stated by me in *The Caledonia*, 157 U. S. 124, 140, I am compelled to dissent from the opinion of the court in this case. The accident in that case occurred by the breaking of a propeller shaft, owing to its having been weakened by meeting with extraordinarily heavy seas on previous voyages. No defect in the ship was visible, or could have been detected by the usual and reasonable means, if the shaft had been taken out and examined.

The minority of the court, conceding the general principle that, in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of the beginning of the voyage, was of opinion that the Caledonia was exempt from the losses claimed by the exception in the bill of lading "of loss or damage from . . . machinery or defects therein." It was argued that

Dissenting Opinion: Brown, Brewer, JJ.

this exception was obviously inserted for the purpose of exempting the ship from some liability to which, without such exception, it would be subject. It evidently was not intended to be limited to mere breakages of machinery which should occur after the voyage began, since the breaking of sound machinery through the stress of weather is treated as an inevitable accident or peril of the sea, for which the ship would not be liable, whether there were an exception or not, and the following cases were cited as sustaining this proposition: *The Virgo*, 3 Asp. Mar. Law, 285; *The William Lindsay*, L. R. 5 P. C. 338; *The Miranda*, L. R. 3 Ad. & Ec. 561; *The Cargo ex Laertes*, 12 P. D. 187; *The Curlew*, 51 Fed. Rep. 246.

In the case under consideration the exception is more specific, and exempts the ship "from loss or damage from . . . accidents or latent defects in hull, tackle, boilers and machinery, or their appurtenances." It was admitted that the sole cause of the accident was a latent defect in a rivet from which the head had come off; that this defective condition of the rivet was caused by the fact that the quality of the iron had been injured during the construction of the vessel by too much hammering, so that it had become brittle and weak, thus rendering it unfit to sustain the reasonable pressure caused by filling the tank with water while at sea.

It was further found by the courts below that abundant diligence had been used in the construction of the vessel; that the defect in the rivet was a latent one which occurred at the time she was built; that it was not discovered and was not discoverable at that time or subsequently, by the exercise of all the known and customary tests and methods of examination, which were all employed.

The question then arises as to what was meant by the exception of "latent defects." It evidently was not intended to refer to defects which became such after the beginning of the voyage through stress of weather or other perils of the sea, since the ship would not be liable for such defects or breakages, whether excepted or not in a bill of lading. A ship is never liable for an accident or breakage of machinery occasioned by perils of the sea, and the word "defects" is

never used in that connection. The words "latent defect," as ordinarily understood, apply to something existing at the time the ship or other vehicle was constructed, and such as was not discovered and could not be discovered by ordinary methods of examination. To exempt a vessel from the consequences of such a defect is neither unreasonable nor unjust, and most of the modern bills of lading contain a stipulation to that effect.

The case of the *Cargo ex Laertes*, 12 P. D. 187, is in point. Bills of lading, under which the cargo was shipped, contained, among other excepted perils, the clauses "warranted seaworthy only so far as ordinary care can provide," and "owners not to be liable for loss, detention or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery, . . . even existing at time of shipment." The Laertes broke down from a latent defect which could not have been discovered by the exercise of all reasonable care, and it was held that the exception of latent defects, if it did not abrogate, at all events limited, the warranty which the law would otherwise imply that the ship was seaworthy at the beginning of the voyage. I do not regard the words "even existing at time of shipment" as adding anything to the words "latent defects," since in our view of those words, as ordinarily understood, they must have existed at the time of shipment.

The hardship of the ruling in the case under consideration appears the more manifest from the fact that the Carib Prince was a British steamer, and that the bill of lading was signed at Trinidad, a port governed by the English law.

I agree with the majority of the court that the Harter Act cuts no figure in this case. While it is possible that the framers of this act may have intended to exonerate ships from the consequences of unseaworthiness where due diligence had been used to make them seaworthy, it must be conceded that the language of the third section does not express such intent, since it only exonerates them from loss or damage resulting from faults or errors in navigation or management. But I think that recent cases in this court have

imposed a most severe and impracticable measure of liability — one which operates with great hardship upon the prudent and careful owner, and one which is calculated to invite further legislation in the direction of the Harter Act.